No. 06-

IN THE

Supreme Court of the United States

ROSA ACUNA ADMINISTRATRIX AD PROSEQUENDUM AND GENERAL ADMINISTRATRIX OF THE ESTATE OF ANDRES ACUNA, DECEASED INFANT,

Petitioner,

v.

SHELDON C. TURKISH, M.D., AND THE OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under New Jersey Law, a physician must disclose all facts that a reasonable patient would consider significant concerning the nature of a medical procedure proposed by the physician, the risks of that procedure, and the alternatives to the procedure. In the case of a patient who is a pregnant woman, under New Jersey Law, the physician has a legal and professional duty to two separate patients, the mother and her unborn child. The physician's duty to the child encompasses a duty to disclose to the child the risks or impact of the procedure upon the unborn child; a duty that is discharged by the physician by making those disclosures to the mother who must make an informed decision for her child, as well as herself.

In the current case, Petitioner, Rosa Acuna, was a 29 year old married mother of two young daughters who, because of abdominal pain, went to her regular gynecologist who determined she was pregnant and recommended she terminate her pregnancy. The doctor failed to disclose the nature of the procedure or anything at all about the unborn child. Mrs. Acuna asked her doctor "is my baby already there?" wanting to know if there was a human being already in existence, in the biological sense. The physician misrepresented the facts and told her "Don't be stupid, it is nothing but some blood." As a result of the negligence of the physician, Mrs. Acuna submitted to the procedure to which she would not have agreed if she was provided with accurate factual information.

The New Jersey Wrongful Death Statute affords a cause of action for all mothers whose children are tortiously injured prenatally, at any age of gestation, and die as a result of that tortious conduct. However, the Wrongful Death Statute, as it was applied in the context of this case when a physician negligently proposed to a mother a procedure that would deliberately terminate her constitutionally protected relationship with her child, denied Mrs. Acuna the Wrongful Death Claim despite the fact she could prove every element of the claim, only because the child's death ensued in the womb instead of outside the womb.

1. Is the question of whether an abortion terminates the life of a human being, in the biological sense - a whole member of the species *Homo sapiens* - a question of scientific fact properly left to the determination of the state legislature or state courts; or is it, under the Fourteenth Amendment of the United States Constitution as construed by *Roe v. Wade*, 410 U.S. 113 (1973), *City of Akron v. Akron Ctr. for Reprod. Health Inc*, 462 U.S. 416 (1983), and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), a question which the state is prohibited from providing a factual answer because, as a matter of Federal Constitutional Law, it is a question which is indeterminable as a question of fact?

2. When a pregnant Mother is denied a claim under New Jersey's Wrongful Death Statute in the context of an Informed Consent Negligence Case where a pregnant mother is attempting to decide whether or not to submit to an abortion, which will, in fact, terminate her existing relationship with her unborn child - a relationship in which she has an interest protected as a fundamental liberty under the Fourteenth Amendment Due Process Clause - and material facts are withheld from her, inducing the mother to submit to an abortion to which she would not have consented if properly informed of material facts, should, in an equal protection challenge to the statute as applied, the classification which denies the mother a Wrongful Death Claim be strictly construed?

3. Does New Jersey's Wrongful Death Statute, as construed by the New Jersey Supreme Court, which allows recovery for tortiously inflicted prenatal injuries which result in the death of an unborn child, but denies recovery for the same losses to the class of mothers whose children's deaths occur in utero, violate the Equal Protection right of those mothers when the injury and death of their children is caused by doctors who, in proposing submission to an abortion, negligently deprive them of informed and voluntary consent resulting in an uninformed termination of their fundamental rights?

PARTIES TO THE PROCEEDINGS

The Petitioner is Rosa Acuna, the mother of an unborn child designated Andres Acuna. She is the Plaintiff, acting in her representative capacity as *Administratrix ad Prosequendum* of the Estate of Andres Acuna, who brought a wrongful death action against her obstetrician for his negligence in performing an abortion without obtaining an informed consent for the procedure in accordance with New Jersey Law.

The Respondents are Dr. Sheldon C. Turkish, M.D. (Mrs. Acuna's regular gynecologist and obstetrician) and the Obstetrical and Gynecological Group of Perth Amboy-Edison, a partnership in which Dr. Turkish is a partner. There are no known subsidiaries or other legal entities associated with the Obstetrical and Gynecological Group of Perth Amboy-Edison.

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Cited Authorities

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Scientific and Medical Authorities:

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ORDERS AND OPINIONS DELIVERED IN THE CASE

On May 1, 2001, the Law Division of the Superior Court of New Jersey issued an opinion holding that the opinion of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), prohibited the State of New Jersey from recognizing any legal claim in which it was required to establish as an element of such claim that the unborn child in utero is a human being or family member as a matter of biological fact. (See, opinion of Law Division at A37). The Law Division subsequently entered an order dismissing the counts of the complaint setting forth a claim for Wrongful Death, and the counts seeking recovery for the emotional distress of Mrs. Acuna as a result of the death of a family member. (See, order dated June 6, 2001 at A 35).

The Appellate Division issued a reported opinion on October 29, 2002 which affirmed the dismissal of the Wrongful Death Claim on the grounds New Jersey did not recognize the death of an unborn child whose death ensues in the womb as a death of a family member for purposes of New Jersey's Wrongful Death Statute; but reversed the Law Division's dismissal of the Emotional Distress Claim on the grounds that the death of the very same unborn child which ensued in utero was recognized under New Jersey Law as the death of a family member, a necessary element of Mrs. Acuna's Emotional Distress Claim. (See, opinions of the Appellate Division at A 15). The Appellate Division's opinion of October 29, 2002 is reported at *Acuna v. Turkish*, 354 N.J. Super. 500, 808 A.2d 149 (N.J. App. Div. 2002) (*Acuna I*). Upon remand, the Emotional Distress Claim was dismissed a second time for the same reason given by the Law Division in *Acuna I*. That order was rendered final because it disposed of all issues as to all parties. Upon appeal, on April 7, 2006, the Appellate Division reversed the Law Division a second time as it related to Mrs. Acuna's individual claim for emotional distress due to the death of her unborn child.

In the same opinion the Appellate Division affirmed anew the dismissal of the Wrongful Death Claim. The Wrongful Death Claim and the Emotional Distress Claim were treated as separate, non-consolidated cases of two separate individuals. The second opinion of the Appellate Division is found at A1. The opinion is

reported at *Acuna v. Turkish*, 384 N.J. Super. 395, 894 A.2d 1208 (N.J. App. Div. 2006) (*Acuna II*).

Defendants petitioned the New Jersey Supreme Court for Certification of the Emotional Distress Claim which petition was granted, the case was fully briefed and argued in February, 2007 before that court. The parties are awaiting that court's decision. The Plaintiff filed an appeal as of right under New Jersey Court Rule 2:2-1(a) (cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States). On January 18, 2007, the Supreme Court of New Jersey dismissed the appeal. Order at A41. It is from this order, effectively affirming the opinions and orders of the Appellate Division in *Acuna I* and *Acuna II* as they relate to the dismissal of the Wrongful Death Claims that Petitioner now seeks a Writ of Certiorari.

STATEMENT OF JURISDICTION

By order of the U.S. Supreme Court Justice David Souter, and operation of the Rules of Court, the time to file this petition was extended to Monday, June 18, 2007. This Court has jurisdiction under 28 U.S.C. § 1257 as construed by *R.J. Reynolds Tobacco Co. v. Durham County, et al.*, 479 U.S. 130 (1986).

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and New Jersey's Wrongful Death Statute, N.J.S.A. 2A:31-1 to 6 (A42).

STATEMENT OF THE CASE

A. The Nature of the Action and Procedural History

Petitioner, Rosa Acuna, brought a medical malpractice claim against Defendants based upon uninformed consent negligence. Claims were brought by two separate Plaintiffs. Mrs. Acuna brought a claim in her individual capacity seeking damages for her own emotional distress due to the injury and death of her unborn child who died in utero during an abortion performed by Defendants without obtaining informed consent. The Emotional Distress Claim, to be recoverable in New Jersey, required proof of the death of a family member. Under New Jersey

Law, death of an unborn child in utero is recognized as a death of an actual family member for the purposes of the Emotional Distress Claim. See, *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) and *Carey v. Lovett*, 622 A.2d 1279 (1993), applying the emotional distress principles first enunciated in *Portee v. Jaffee*, 417 A.2d 521 (1980) to the emotional distress of a pregnant mother whose unborn child is tortiously injured and killed in utero. Mrs. Acuna's Emotional Distress Claim was dismissed by the Law Division on two separate occasions in the erroneous belief that this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) prohibited the state from recognizing the fact that the unborn child was a human being in the biological sense – effectively declaring the New Jersey's *Giardina-Portee* Emotional Distress Claims unconstitutional under the reasoning of *Roe*. Twice the Appellate Division of the Superior Court of New Jersey reversed those dismissals and reinstated the complaint as to Mrs. Acuna's individual claims for her emotional distress due to the death of her unborn child during the abortion. See, opinions of the appellate Division, at A1 to 34; reported at *Acuna v. Turkish* 808 A.2d 149 (N.J. App. Div. 2002) (*Acuna I*) and 894 A.2d 1208 (N.J. App. Div. 2006) (*Acuna II*).

The second Plaintiff was Mrs. Rosa Acuna acting in her representative capacity as the *Administratrix ad Prosequendum* of the Estate of her unborn infant designated as Andres Acuna. When the Law Division first dismissed the Emotional Distress Claim, that court also dismissed the Wrongful Death Claim. The Law Division dismissed both claims on the basis that *Roe v. Wade* 410 U.S. 113 (1973) held that the unborn child was not a "constitutional person" and for that reason the state was prohibited to recognize a claim that required proof of the death of a human being. See, Law Division opinion dated May 1, 2001 at A37. When the Appellate Division reversed the Law Division, and remanded the Emotional Distress Claim back to the Law Division in *Acuna I*, the Appellate Division affirmed the dismissal of the Wrongful death Claim.

The Appellate Division held that although Mrs. Acuna was permitted to recover for the death of her child as that death related to the Emotional Distress Claim, New Jersey created the fiction for purposes of the Wrongful Death Claim that the family member

- whose death was recognized for purposes of the Emotional Distress Claim - did not exist, and there was no death. Because of the peculiarities of New Jersey practice, the order of the Appellate Division that affirmed the dismissal of the Wrongful Death Claim was not a final order and the *Administratrix ad Prosequendum* had no right of appeal at that time (yet all of her claims were dismissed). On the remand to the Law Division, Mrs. Acuna's individual claim for emotional distress was dismissed a second time. Whereas the first dismissal was based upon the Law Division's erroneous belief that *Roe v. Wade* prohibited the state from recognizing the unborn child was, in fact, a human being as that fact related to damage issues; a second judge dismissed the Emotional Distress Claim on the grounds that *Roe v. Wade* prohibited recognition that the unborn child was, in fact, a human being as that fact related to issues of liability. Since that dismissal rendered all of the orders final, Mrs. Acuna in her individual capacity, and the *Administratrix ad Prosequendum* both had the right to appeal.

On appeal, the Appellate Division reversed the dismissal of the Emotional Distress Claim a second time. *Acuna II* at A1. That particular case is currently pending in the New Jersey Supreme Court following a grant of a petition filed by Defendants for Certification. That cause was argued before that court in February, 2007 and the litigants are awaiting the opinion of the New Jersey Supreme Court. When both parties appealed the final order of the Law Division, the Appellate Division treated the two cases as separate appeals unconsolidated. In *Acuna II* the Appellate Division again affirmed the dismissal of the Wrongful Death Case. Since the *Administratrix ad Prosequendum* had contended throughout the entire litigation of the Wrongful Death Case the denial of the Wrongful Death Claim as applied to Mrs. Acuna's case violated her Equal Protection Rights, she filed an appeal as of right under New Jersey Rule 2:2-1(a)(1) with the New Jersey Supreme Court. By order dated January 18, 2007 (at A41), the New Jersey Supreme Court dismissed the appeal in the Wrongful Death Case on the grounds that the Federal Constitutional issue raised by Petitioner was not substantial, leaving in place the opinions of the Appellate Division explaining the grounds for dismissal in *Acuna I* and *Acuna II*. By order of Justice David Souter

the time for filing this petition was extended to Monday, June 18, 2007.

STATEMENT OF FACTS

On April 6, 1996, Rosa Acuna was a twenty-nine year old married mother of two daughters, ages two and a half years and nine and a half months. See, Dep. Of Rosa Acuna, P. 8 L. 6 to 7; P. 10 L.5 to P. 11 L.5, at Pa 102 to 104. As of that date the defendant, Dr. Sheldan Turkish, had acted as Mrs. Acuna's regular gynecologist for five years and had delivered Mrs. Acuna's second daughter nine and a half months earlier by repeat Caesarean section. See, Acuna Dep., P. 64 L. 9 to P. 71 L. 24, at Pa 105 to 112; See, Turkish office chart at Pa 113 to 123 (June 21, 1995). Mrs Acuna went to see Dr. Turkish on April 6, 1996 because she was having constant abdominal pain. See, Dep. Of Acuna, P. 147 L.3 to P. 148 L.11, at Pa 139 to 140. The defendant examined the plaintiff and conducted an ultrasound which revealed that Mrs. Acuna was pregnant with her third child. Dep. Of Turkish, P. 57 L.1 to P. 58 L.16, at Pa 129-130; ultrasound, at Pa 131. When she originally went to Dr. Turkish on April 6, Mrs. Acuna neither knew nor suspected that she was pregnant, and learned that she was pregnant only after his examination and the ultrasound, and was "surprised" to learn of it. See, Acuna Dep. P. 147 L.3 to P. 148 L. 11, at Pa 139 to 140; P. 161 L. 14 to 20, at Pa 160.

After advising Mrs. Acuna that she was pregnant, Dr. Turkish told her that she should have an abortion. Acuna Dep., P. 109 L.6 to 10, at Pa 154; P. 158 L.23 to P. 159 L.3, at Pa 141-142; P. 161 L. 14 to 20, at Pa 160. It is undisputed that when Dr. Turkish discussed the abortion with her on April 6, Mrs. Acuna wanted to know one fact before she would consider signing a consent to the medical procedure. Mr. Acuna asked Dr. Turkish if her "baby was already there". She wanted to know if there was already an existing human being. Acuna, P. 108 L.4 to P. 111 L. 16, at Pa 153 to 156; P.146 L. 12 to 17, at Pa 157; see, certification of Acuna at Pa 199. If she knew that the abortion procedure terminated the life of a living human being she would never have consented to it. See, Acuna at Pa 199; Acuna Dep. P. 146 L.12 to 17, at Pa 157; P. 108 L.4 to P. 111 L.16, at Pa 153 to 156.

It is undisputed that on April 6, 1996 Dr. Turkish stated that the unborn child was not in existence, and there was no human being. According to Mrs. Acuna, Dr. Turkish answered her question by telling her "Don't be stupid, it is nothing but some blood." Acuna Dep. P. 108 L.4 to P. 111 L.16 at Pa 153 to 156; P. 179 L.18 to 21, at Pa 158; P. 160 L.19 to P. 161 L.20, at Pa 159-160; Cert. of Acuna, at Pa 199-200. According to Dr. Turkish, although he didn't remember specific discussions with Mrs. Acuna, if she asked him the question as she said she did, he would have told Mrs. Acuna that "it was only some tissue". He stated that he believed he told her it was not a human being. Dep. Of Turkish, P. 165 L.10 to 21; Turkish, P. 166 L.11 to 16, at Pa 163-164; P. 102 L.20 to P.103 L.21, at Pa 165-166. Dr. Turkish's statements which denied that Mrs. Acuna's unborn child was already there or in existence were totally false (discussion of this fact follows below). The fact that the child was already in existence and that the abortion would terminate the life of an existing living human being was not only relevant to Mrs. Acuna's decision of whether or not to have an abortion, it was the single determining factor. Acuna Cert., at Pa 199-200. Turkish's misrepresentation deprived Mrs Acuna of her ability to make an informed decision or consent. See Cert. of Dr. Nathanson at Pa 469, 470, 479-481.

By depriving Mrs. Acuna of accurate biological facts Dr. Turkish forced her to make a decision which affected the waiver of her own constitutionally protected interest in her existing relationship with her child, as well as interests personal to the child, without information necessary to reach a reasoned decision. As a consequence she did not know she was terminating a relationship with an existing offspring, nor did she know that the doctor would be terminating the life of a human being already in existence. It is common when contemplating an abortion for a woman to want to know whether or not there is already a human being in existence, and women place importance on that fact. See, Cert. of Everett, at Pa 392-393; Pa 397 to 399. The plaintiff contends that she can prove to a jury that a reasonable and prudent patient in Mrs. Acuna's position would consider the fact that the abortion procedure terminates the life of a living human being material to a decision of whether or not to have the procedure.

On April 9, 1996, Mrs. Acuna returned to Dr. Turkish's office and signed a "consent form" which read in its entirety:

> "I hereby give my consent for Dr. Turkish to perform a TOP. He has explained all of the risks and complications to me." See, Pa46.

The staff member who gave Mrs. Acuna the consent form, Jenny Perez, did not explain anything about the abortion procedure prior to her having Mrs. Acuna sign the "consent form," because, according to Mrs. Perez, she is neither trained nor qualified to counsel a woman considering an abortion. Dep. of Perez, P. 25 L.4 to P. 31 L. 22, at Pa 143 to 149. The only other employee of Dr. Turkish who saw Mrs. Acuna on April 9, 1996, was Brenda Salerno, who, like Jenny Perez before her, did not advise or counsel Mrs. Acuna about the nature of the abortion procedure or any facts relevant to Mrs. Acuna's decision because she was neither trained nor qualified to provide such counseling. See, Dep. Of Salerno, P. 33 L.3 to P. 34 L. 13, at Pa 151-152.

Other than the "consent form" at Pa 46, no forms or written information or questionnaires were given to Mrs. Acuna to read or fill out. Dep. Of Turkish, P. 14 L.15 to 25, at Pa 150.

On April 9, 1996, the age of Mrs. Acuna's unborn baby was at least seven to eight weeks post-conception. (See detailed factual analysis at Pa 53 (bottom) to Pa 58 (middle)). The abortion was performed by Dr. Turkish that day at his office in Perth Amboy. Dep. Of Turkish, P. 15 L.15 to P. 17 L.25, at Pa 124 to 126, P. 26 L.17 to 25, at Pa 127. Dr. Turkish admitted that the vacuum aspiration procedure used on April 9th "in fact, kills the fetus" and "further action is neither taken or necessary". See, Dep. Of Turkish, P. 259 L.22 to P. 260 L.8, at Pa 501 (bottom) to 502.

Following the abortion of April 9th Mrs. Acuna experienced bleeding for almost four weeks until she had a massive hemorrhage. On May 5, 1996, she was rushed to Robert Wood Johnson University Hospital emergency room where she was examined and admitted. See, Dep. of Acuna, P. 187 L.10 to P. 188 L.16, at Pa 167-168; P. 190 L.23 to P. 191 L.9, at Pa 169-170; see, Hospital Records showing her diagnosis as "Incomplete Abortion", at Pa 171.

While in the emergency room Mrs. Acuna asked the nurse what was wrong with her and the nurse told Mrs. Acuna "They left part of your baby in you." Acuna Dep. P. 187 L.10 to P. 188 L.16, at Pa 167-168; P. 83 L.2 to P. 84 L.9, at Pa 172-173. After undergoing a D.&C. Mrs. Acuna went home. She could not reconcile what Dr. Turkish had told her - that the baby was not there, only some blood - and the statement of the nurse that part of her baby was left in her. Mrs. Acuna then went to some libraries to read texts dealing with human development, some encyclopedias and consulted other persons. See, Dep of Acuna, P. 83 L.2 to P. 84 L.9, at Pa 173-174. At some point thereafter, Mrs. Acuna realized and concluded that Dr. Turkish misrepresented the facts to her, and that an unborn child, a human being, was in fact in existence on April 9th and Dr. Turkish terminated the life of a living human being. Acuna, P. 195 L.3 to P. 196 L. 25, at Pa 174-175.

It is beyond reasonable dispute that the abortion procedure performed by Dr. Turkish on April 9, 1996 terminated the life of a living human being. See, and compare Certification and Expert Report of Dr. David Mark (Molecular Biologist), at Pa 222-258; Certification and Expert Report of Dr. Marie Peeters-Ney (Expert in Human Genetics), at Pa 259 to 280; Certification and Expert Reports of Dr. Bruce Carlson (Human Embryologist), at Pa 281 to 320; Certification and Expert Reports of Dr. Ola Saugstad (Neonatologist), at Pa 400 to 446; Certification and Expert Report of Dr. Jacob Langer (Expert in Fetal Surgery), at Pa 321 to 360; Certification and Expert Reports of Dr. Gabriella deVeber (Pediatric Neurologist), at Pa 361 to 391; Certification and Expert Reports of Dr. Nathanson, at Pa 400 to 446; and Certification and Expert Report of Carol Everett (expert in procedures and practices of abortion providers), at Pa 392 to 399.

The fact that the unborn child between four and eight weeks post-conception is, in fact, a living human being in the scientific and biological sense, is universally known among the scientific and medical community. See, Saugstad, at Pa 445-446. It was universally known among abortion providers even in the 1980's. See, Everett, at Pa 392 to 399. Thus, the plaintiff will be able to prove at trial, for purposes of proving the uninformed consent

negligence liability, the fact that Mrs. Acuna's child was an existing human being on April 9, 1996 and the abortion procedure terminated the life of a living human being. Those facts are relevant to the liability, whether it be to establish entitlement to damages under Count Eleven which survived the motion for partial summary judgment or whether to establish entitlement to emotional distress damages, and a Wrongful Death claim.

Although, the courts must resolve all doubt concerning proof of those facts in favor of Mrs. Acuna as the non-moving party on a motion for summary judgment, it is illuminating to examine the defendant Turkish's contentions for his purpose of defending this case. On the first day of his depositions, Dr. Turkish stated that the unborn child of Mrs. Acuna was not a human being. See, Turkish Dep., P. 96 L.18 to 25, at Pa 138; P. 98 L.19 to 25, at Pa 176; P. 120 L.10 to 18, at Pa 183. Dr. Turkish claimed that an unborn child aged seven weeks was "just tissue". Turkish, P. 165 L.10 to 21, P. 166 L. 11 to 16, at Pa 163-164. Dr. Turkish claimed that an unborn child is not an existing human being until so-called viability, at 20 to 24 weeks post-conception. Turkish, P. 204 L.18 to P. 205 L.15, at Pa 179-180.

The absurdity of this contention is underscored by two aspects of his testimony. First, when asked, he admitted that he knew of no scientific or medical literature that supports his contention that the child is not a human being until "viability". Turkish Dep. P. 204 L.18 to P. 205 L.15, at Pa 179-180. Since he could not produce a single scientific or medical authority to support his factual contention, Dr. Turkish claimed that the conclusion about that issue is a matter for his personal philosophy or beliefs. His only basis for this view is his understanding of *Roe v. Wade*, 410 U.S. 113 (1973) of which, he admitted, he never read any portion. Turkish, P.118 L. 4 to P. 121 L. 23, at Pa 181-182, P. 204 L. 18 to P. 205 L. 15, at Pa 179-180. Thus, Dr. Turkish claims that when advising a woman about abortion he has the right to impose on the mother his own "philosophical" value system instead of informing the mother of the scientific and medical facts so she can make a determination for herself and her unborn child. The concept of "viability" is totally irrelevant, scientifically and medically, to the fact question of whether the unborn child is a

human being. See, Cert. of Saugstad, at Pa 440-441; See also more extensive discussion in certification of Saugstad at Pa 503 to 509.

It is clear that any medical doctor or scientist who denies that the unborn child is a "person" is not speaking of the biological and scientific question, but the personal value judgment that those doctors or scientists make concerning whether to accord to that human being the same moral value or legal rights accorded to other human beings. See, Saugstad, at Pa 445-446. See also, Certification of Professor Robert George, at Pa 447 to 468 (issue addressed at 466 to 468). See Turkish, P. 204 L. 18 to P. 205 L. 15, at Pa 179-180.[1]

Dr. Saugstad's distinction (and that of Prof. George) between the scientific factual question and the value or moral question is even acknowledged by Dr. Turkish himself. In the second day of his deposition, Dr. Turkish admitted that the life of a human being begins at conception. (See list of his admissions found at Pa 489-490 with references to his deposition testimony at Pa 493 to 502).

These admissions of Dr. Turkish are at odds with his statement to Mrs. Acuna in April, 1996 that her unborn child was nothing but "some blood" or "some tissue" and also at odds with the position he has taken for purpose of defending this case that the unborn child is not a human being at four to eight weeks post-conception. However, his testimony given near the end of the second day of depositions explains the discrepancy. Where Dr. Turkish says the unborn child is not a human being at four to eight weeks post-conception, he is clearly speaking about his personal philosophical view that the life of that particular human being should not be afforded the same value and protections as other human beings. He is not speaking about the scientific and biological fact that there is a human being in existence at that time. This is clear from his testimony on P. 242 to 244 of his deposition, at Pa 495 to 497. When he was first asked if he agreed

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1. This conclusion, that it is universally accepted in the scientific community that the unborn child is a human being as a matter of fact (but those who deny that fact in every instance are speaking only to the value judgment) is the subject of the report of the Committee of the Judiciary of the United States Senate. See, Report of Subcommittee of Judiciary Committee of U.S. Senate on Human Life Bill, 1981.

or disagreed that "life begins at the moment of conception - the time when a female reproductive cell, the ovum, is fertilized by a male reproductive cell, the spermatozoon", Dr. Turkish stated that statement is a subjective "philosophical thing". When he was told that the statement is made as a biological fact, he agreed with the statement as an accurate statement of biological fact. See, deposition of Dr. Turkish, P. 242, L. 16 to P. 244 L.8, at Pa 495 to 497.

In short, Dr. Turkish replaced Mrs. Acuna's judgment with his own by refusing to provide her with the scientific and medical facts she sought. That is the essence of uninformed consent. See, Nathanson, at Pa 469-482. When Mrs. Acuna learned a month or so later that on April 9, 1996 Dr. Turkish had terminated the life of a living human being, her existing unborn child, the result was a severe, deep and profound depression and emotional distress that threatens the basis of her stability. See, Certification of Psychologist Theresa Burke, at Pa 203 to 221. In fact, Mrs. Acuna's distress was so severe that she had counseling sessions that lasted three to four hours, and her constant rumination about the death of her unborn child so pervasive that fourteen months after the procedure she wrote, arranged and recorded a haunting song to her unborn child who died as a result of the abortion of April 9, 1996. See, proffer, at Pa 513 to 516.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. This Court's Decisions In *Roe v. Wade* And *Planned Parenthood v. Casey* And Their Progeny Have Caused Great Confusion Among The Lower Federal Courts And The State Courts. The Ambiguities Of Those Decisions Have Caused Widespread Harm To The Rights And Interests Of Women Of This Nation, Resulting In The Unjust Termination Of, Or Adverse Impact Upon The Fundamental Liberty Interests Of Pregnant Mothers. The Injustice In This Case Is A Perfect Example Of The Manner In Which *Roe* And *Casey* Are Routinely Misused To The Detriment Of The Very Women Those Cases Are Intended To Protect. Only This Court Can Correct These Injustices. The New Jersey Supreme Court And The New Jersey Appellate Division Wrongly Decided A Critical Federal Constitutional Issue That Affects Many Thousands Of Women Each Year, Issues Which This Court Have Not Directly Decided, But Should Now Decide. The New Jersey Courts Decided These Important Issues In A Way That Conflicts With The Relevant Decisions Of This Court.

New Jersey's refusal to allow Mrs. Acuna to pursue her Wrongful Death case against Dr. Turkish, under the facts of this case, violate Mrs. Acuna's equal protection rights. Under the facts of this case, three different fundamental Due Process Liberty Interests of Mrs. Acuna were terminated or adversely affected by the doctor's conduct: Mrs. Acuna's fundamental interest in her relationship with her child; her constitutionally protected interest in making decisions to advance the welfare of her child; and Mrs. Acuna's liberty interest in her own health.

The confusion evidenced by the reasoning of the trial courts in this case resulting from the decisions of this Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), involves errors widely made in other courts. For instance, although the U.S. Court of Appeals for the Third Circuit has held that the question of whether an unborn child is a human being is a question of scientific fact for a jury (*Alexander v. Whitman*, 114 F.3d 1392, 1401 (3rd Cir. 1997)), the U.S. Court of Appeals for the Eighth Circuit, in apparent conflict, disagreed holding that *Roe* and *Casey* mean that, since there is no consensus on whether

the unborn child is a human being, no court but the United States Supreme Court can treat the issue as a question of fact. *Planned Parenthood, et al v. Rounds, et al*, 467 F.3d 716, 724 (8th Cir. 2006) (the opinion was vacated by an *en banc* panel on January 9, 2007 and reargument heard an April 11, 2007).

Denial of the protection of the wrongful death statute as it is applied to the negligent termination of plaintiff's fundamental interests and the life of her child in utero by a doctor performing an abortion violates the equal protection rights of Mrs. Acuna. New Jersey permits recovery of damages by a mother for the wrongful death of her child where the death results from tortiously inflicted injuries in utero. *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). However, New Jersey law does not permit recovery of wrongful death damages by a mother, even if she can prove liability, if the injury tortiously inflicted on her child in utero results in death in utero. *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988).

A. The Relevant New Jersey Tort Law

1. The Nature Of The Liability: Uninformed Consent Negligence

(a) General Principles of Informed Consent

The negligence of Dr. Turkish was his failure to obtain an informed consent. See, *Acuna v. Turkish*, 800 A.2d 149, 156-159 (N.J. 2002)(*Acuna I*); *Acuna II*, at 1211-1212; 1214-1215. Uninformed consent is a negligence concept predicated upon the duty of a doctor to disclose such information as will help the patient make an informed decision about her medical treatment. *Largey v. Rothman*, 540 A.2d 504, 505-508 (N.J. 1988). A fact must be disclosed if a reasonable patient in the plaintiff's position would likely attach significance to it in deciding to undergo or forego a procedure. *Largey*, at 504-505; 506-508; 510-512.

A doctor has a general duty of care to the child to preserve the child's health and life at every age of gestation. *Giardina v. Bennett*, 545 A.2d 139, 142-3, 145; See, also *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). Thus, the physician who has a pregnant mother as a patient has two separate patients, the mother and her unborn child, and the doctor owes a duty to both. *Procanik*, at 760; *Giardina*, at 141-143, 145; *Hummel v. Reiss*, 608 A.2d 1341 (N.J.

1992). American College of Obstetricians & Gynecologists, *Ethics in Obstetrics and Gynecology*, 34 (2nd Ed. 2004); Harrison et al, *The Unborn Patient*, 2d Ed. W.B. Saunders, Phil. 1991. The doctor's duty to the child in utero encompasses a duty to disclose to the child the risk or impact of a procedure upon the unborn child. The doctor discharges that duty by making the disclosure about the impact on the child to the pregnant mother, who must make the decision for her child. *Draper v. Jasionowski*, 858 A.2d 1141, 1146-1148 (N.J. 2004); *Hughson v. St. Francis Hospital*, 459 N.Y.S. 2d 814, 92 AD.2d 131, 132-133, 135-138 (1983) (To the unborn child "an independent duty of disclosure, via the mother, is owed."). The doctor is duty bound to insure that the mother knows that the second patient is in existence, and that the procedure will terminate the life of an existing member of the species.

(b) The Standard to be Applied When a Patient Asks for Information

Mrs. Acuna asked Dr. Turkish whether her "baby was already there." By baby she meant a "human being," or whether there was "life in there." The doctor had a duty to answer her inquiry fully and accurately, and all reasonable follow-up questions. *Howard v. Univ. Of Med. and Dent. of N.J.*, 800 A.2d 73 (N.J. 2002).

This additional standard of disclosure is imposed for three reasons. First, the patient put the doctor on notice that *she* considered the answer material. Second, the standard reflects a policy which does not permit the doctor to deceive the mother. If he misrepresents facts that she considers material, even dispositive of her personal decision, it is manifestly unjust to have a policy that permits misrepresentations. In this case the doctor cut off all questioning, saying "Don't be stupid." If he answered her question accurately and truthfully, he would have learned that she did not want the procedure he proposed. Finally, the standard of disclosure in a case which involves an abortion must reflect policy considerations unique to the mother's decision. She is, in fact, involved in determining whether or not to waive perhaps her most important liberty interest, her constitutionally protected fundamental interest in her relationship with her child. *Santosky v. Kraemer*, 455, U.S. 745 (1982); *Lehr v. Robertson*, 463 U.S. 248, 256, 259-260; n16 (1983); *Caban v. Mohammed*, 441 U.S.

380 (1979); See, *Berman*, at 14-15. The standard must reflect the magnitude of the fundamental right which is terminated. See, *D.Y.F.S. v. A.W.*, 512 A.2d 438, 444 (N.J. 1986). *Howard* held that a patient to whom a doctor gives a deceptive answer in response to a question has an Uninformed Consent Negligence claim, if a false answer would affect the validity of the consent. *Howard*, at 82-83. In Mrs. Acuna's case, her question went directly to the nature of the procedure and the risk to, and impact on, the second patient for whom she was making a decision. Mrs. Acuna relied upon his misrepresentation. See, Mrs. Acuna's Dep., Pa.155 L.17 to 23; Pa.156 L.14-15; Burke, Pa.203-04; Pa.219-20.

2. The Nature Of The Damages: Prenatal Injuries Resulting In The Child's Death

There are three different kinds of damages recognized as recoverable under New Jersey law for prenatal injuries resulting in the child's death. New Jersey recognizes personal injury claims for children who are tortiously injured in utero at any age following conception. *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). If the child dies from injuries which are sustained in utero, damages are recoverable by the survivors in wrongful death, and by the estate of the child for the injuries while the child was alive in the same manner as if the injuries were sustained after birth. See, e.g. *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993).

(a) Prenatal Injuries Are Compensable

Smith v. Brennan rejected the false assumption of fact in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct. 1884) that the child was not a separate human being:

> "[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body." *Smith* at 501-502.

Second, *Smith* rejected the argument that a cause of action should not be extended for prenatal injuries because proof of a causal connection between tortious conduct and an injury not discovered until birth is so difficult as to render the proof "conjecture" or "speculative". *Id* at 503. Third, *Smith* rejected limiting the claim

for injuries sustained only after the baby reaches the age of "viability":

> The usefulness of that (viability) distinction has disappeared with the modern repudiation of the Dietrich theory. And since it has no cogent medical reason to support it, and no relevancy to the harm resulting from prenatal injury, we do not believe that it has any place in the determination of the question of liability for wrongful conduct. *Id.* at 504-505.

(b) Damages for Prenatal Injuries Which Result in Death

(i) The *Giardina-Portee* Emotional Distress Claim

One who suffers severe psychological injury as a result of witnessing the injury and death of a close family member has a claim for emotional distress. *Portee v. Jaffee*, 4117 A.2d 521 (N.J. 1980). In *Giardina v. Bennett*, 545 A.2d 139, 139-143, the New Jersey Supreme Court extended recovery for these Common Law Damages to circumstances where a pregnant mother suffered emotional distress because of the tortious injury and death of her unborn child which occurs in utero. See, also, *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). Significantly, *Giardina* expressly acknowledged that a pre-birth death satisfies *Portee's* requirement that the plaintiff sustain the actual loss and death of a person in the family:

> The experience of pregnancy and child birth itself constitutes the immediacy and presence of the claimant in the face of inflicted personal injury or *death of a loved one* that was stressed in *Portee*. *Giardina*, 111 N.J. at 419-420 (emphasis added).

Carey, Supra, described the intimate relationship that exists during pregnancy which the law seeks to protect and which justified dispensing with the need for a mother's "contemporaneous" awareness of "the malpractice and the injury to the fetus."

> The unique relationship between a pregnant woman and her baby mitigates the need for the additional requirements of an "indirect claim" for emotional

> distress. Bound by physical and emotional ties, mother and baby are so closely joined that we need not require that the mother be "shocked" by malpractice on the baby. The maternal-fetal relationship bespeaks the genuineness of an otherwise-valid claim for emotional distress...Carey, at 59; See also, *Id* at 58-60.

The Appellate Division held that the pre-birth death of Mrs. Acuna's child is the death of a family member for her *Giardina-Portee* claim. *Acuna I*, at 313-18; *Acuna II*, at 401-02; 406.

(ii) The Wrongful Death Claim

The wrongful death statute (*N.J.S.A. 2A:31-1 to 6*) creates a claim for a mother whose child dies as a result of tortious conduct. *Green v. Bittner*, 424 A.2d 210 (N.J. 1980). It did not exist at British or early American common law. *Giardina*, at 424 (1988). The damages derive from, and provide compensation for, the loss of companionship and special relationship between a mother and her child over their lifetime. *Green v. Bittner, supra; Giardina*, at 415; *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). It is not required for recovery that the survivor was dependent upon the decedent. *N.J.S.A.* 2A:31-4; *Cassano v. Durham*, 436 A.2d 118 (N.J. L. Div. 1981); *Wolff v. Mercer Med. Cent.*, 532 A.2d 265 (App. Div. 1987); *Housen v. Olesky*, 176 A.2d 297 (N.J. App. Div. 1961); *Bohr v. Penn. R. Co.*, 93 A.2d 190 (N.J. App. Div. 1956). The wrongful death damages are recoverable if prenatal injuries result in death. *Carey*, Supra.

(iii) The Survival Action Claim

The Survival Action Statute, *N.J.S.A.* 2A:15-3, allows a claim for an injured child, which the child would have had if the child's death had not ensued, to be prosecuted after the child's death. *Dyer v. City of Newark*, 416 A.2d 429 (N.J. App. Div. 1988); *Soden v. Trenton and Mercer Cty. Trust Co.*, 127 A. 558 (N.J. 1925); *Alfone v. Sarno*, 402 A.2d 857 (N.J. 1981); *see, Giardina*, 146-148. Survival Action damages are recoverable where the injury which causes death occurs in utero. *Carey*, supra.

The *Giardina-Portee* claim is designed to protect the health of the mother (emotional distress due to "loss of a loved one"), rather than the mother's relationship with the child (protected by the

Wrongful Death claim) or the child's health and life (Survival Action).

3. The Irrational Classification Of Mothers Who Are Not Permitted To Recover Wrongful Death Damages

New Jersey has created an irrational sub-class of mothers who are not allowed recovery of wrongful death damages despite the fact they can prove every element of the claim.

(a) The Nature of the Excluded Class

Noting that under *Smith v. Brennan*, "a child may recover for tortiously inflicted prenatal injuries", the N.J. Supreme Court concluded that- the statutory requirement which limits recovery for wrongful death to situations where the decedent's death is one "such as would, if death had not ensued, have entitled" the child to maintain an action for "damages resulting from the injury" is satisfied in case of prenatal injury resulting in death. *Giardina v. Bennett*, 545 A.2d 139, 146 (n.2). However, *Giardina* construed the wrongful death statute as excluding a subclass of mothers based exclusively upon where the child was at the moment death ensued. If a child is injured in utero, at any age of gestation, but lives but for a moment outside the mother, Wrongful Death damages may be recovered. See, *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). If the same child is injured in utero by the same tortious act, but his death ensues in utero, the mother may not recover.

In this case, the Appellate Division stated that "Nothing in the act attempts to classify mothers...nor does the statute, on its face, focus on any special familial relationship..." *Acuna I*, at 154-155. This statement is inaccurate. The New Jersey Supreme Court has construed the statute to include, among those who can recover, the class of pregnant mothers whose children are injured in utero, but whose death ensues after live birth. That Court construed the statute to exclude from recovery pregnant mothers whose children are injured in utero but whose deaths ensue in utero. It is the "invidious discrimination between" these two classifications which must be compared and examined. See, e.g. *Parham v. Hughes*, 441 U.S. 347, 356, n.7 (1979). The statute contains these classifications because the Supreme Court has construed

the statute to include these classifications, which *Giardina* expressly held was the intent of the legislation. Regardless, the classification must be subjected to constitutional scrutiny because "the equal protection guarantee applies to the decisions of the courts as well as to the acts of the legislature." *Acuna*, at 153-154, citing *Jersey Shore Med. Center-Fitkin Hosp. v. Baum's Estate*, 417 A.2d 1003, 1007 (N.J. 1980).

(b) The State's Only Basis for Excluding the Class of Mothers From its Protection Has Been Acknowledged by New Jersey to be an Incorrect Assumption of Fact

The Wrongful Death Statute was construed to exclude mothers whose children's prenatal injuries result in pre-birth death based exclusively on the premise that the 19th century legislature could not have intended to include pre-birth death cases because it operated under a false assumption of fact that the unborn child was merely part of his or her mother. *Giardina*, 111 N.J. at 421.

> ...At the time the Act was enacted it was not generally thought that a fetus could be considered a "person," in a legal or juridical sense. *This is evidenced by the common law, which treated an unborn child as being "merely a part of his mother without separate existence or personality." Smith v. Brennan*, 157 A.2d 497 (N.J.1960) (discussing common-law treatment of the unborn);...- The Legislature adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act. *Giardina*, 554 at 143-144 (Emphasis added).

Thus, the only reason for this anomaly of excluding this class of mothers is the fact that the nineteenth century legislature operated under a false assumption of scientific fact. However, the *Giardina* Court, when construing the wrongful death statute, felt compelled to recognize the existence of the unborn child as a person in fact for purposes of the Judge-made common law claims.

B. Denial Of The Protection Of The Wrongful Death Statute As It Is Applied To Negligent Termination Of Plaintiffs' Fundamental Interests By An Abortion Doctor Violates Mrs. Acuna's Equal Protection Rights

The discriminatory classification must bear a rational relationship to the purpose of the law, or where fundamental personal rights are involved, it must be justified by a compelling state interest. *Weber v. Aetna*, 406 U.S. 164, 175 (1972); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Plyer v. Doe*, 457 U.S. 202, 216 (1982); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344 (1949).

1. The Classification Must Be Strictly Scrutinized

The purpose of New Jersey's wrongful death statute is to protect, through deterrence, the familial relationships and the lives of those involved, and to compensate for the loss of companionship resulting from the tortious death of a close family member. *Green v. Bittner*, 424 A.2d 210, 212-216 (N.J. 1980). The U.S. Supreme Court has stated that the purpose of a wrongful death statute implicates the "intimate, familial relationship between a child and his own mother." *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); See, also, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

(a) The Mothers' Own Equal Protection Rights Are At Stake, and It is The Actual Loss They Sustained Which Defines The Classification Under Scrutiny

By denying Mrs. Acuna a wrongful death claim, New Jersey violates the equal protection rights of the plaintiff because she sustained the same loss as other mothers who are protected under the statute. *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968). *Glona* held that Louisiana violated the Equal Protection rights of a class of mothers by denying them claims under its Wrongful Death Statute. *Glona* held that it is the actual losses sustained by the mothers which define their class and determine whether that class is similarly situated to mothers permitted recovery. In *Glona*, Louisiana denied the mother benefit of the Wrongful Death statute because Louisiana created the legal fiction that the mother's child, born out of wedlock, did not exist (a "non-

person"). Like Louisiana, New Jersey denies Mrs. Acuna the Wrongful Death damages because it has created the legal fiction that the plaintiff's child did not exist.

Glona held that a state could not "define" its wrongful death claims as it sees fit by denying that mothers lost their children by declaring a class of human beings "non-persons."

> To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue, for the Equal Protection Clause necessarily limits the authority of a state to draw such "legal" lines as it chooses. . .[w]here the claimant is plainly the mother the state denies equal protection of the laws to withhold relief merely because the child wrongfully killed [was deemed a "nonperson"]. *Glona*, 391 U.S. at 75-76.

Yet New Jersey's fiction used to deny plaintiffs' Wrongful Death damages is uniquely egregious. Not only is the fiction based upon an assumption which its Supreme Court acknowledged was a mistaken assumption of fact, New Jersey law recognizes the actual fact that the death of the mother's child in utero is the death of a family member for other purposes. *Giardina*, 545 at 142-144.

In fact, New Jersey has acknowledged that the mothers who are not permitted recovery under the Wrongful Death Statute whose children are injured in utero and die in the womb sustain *exactly* the same loss as the mothers whose children are injured in utero and die outside the womb, allowed recovery:

> The relationships in this case ["pre-birth" death] are not different and the expectations of the parents are not distinguishable [from "post-birth' death cases]. Consequently, the parental and family interests, and the duty to protect those interests, are the same. *Giardina*, 545 at 142-144.

(b) Only a compelling State Interest can Justify the Classification

The right at issue is that of equality of treatment. It is, therefore, irrelevant whether or not a state is *required* to provide a claim in the first instance. Once the state acts to protect some

individuals, it must provide protection to all unless there is a legitimate state interest promoted by the denial to the excluded class. *Harper v. Virginia*, 383 U.S. 663, 665 (1966); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Weber v. Aetna*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *Griffin v. Illinois*, 351 U.S. 12 (1956). "Classifications affecting fundamental rights are given the most exacting scrutiny". *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

(i) The Plaintiff Rosa Acuna has a Fundamental Liberty Interest in her Relationship With Her Child Protected By the Due Process Clause: The *Post-Glona* Cases - The Self-Evident and Intrinsic Human Rights of the Mother

The relationship between parents and their children within marriage and the traditional family has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The entitlement to protection of this fundamental right was first declared to be "self-evident" in the *pre-Glona* case of *Meyer v. Nebraska*, 262 U.S. 390 (1922) and reaffirmed in the *post-Glona* cases. *e.g. Lehr v. Robertson*, 463 U.S. 248, 256 (1983). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organ. of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). It has been described as an interest in the "companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

In contrast to the father of a child born out of wedlock, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting much of the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. at 398-99, and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: *"The mother carries and bears the child, and in this sense her parental relationship is*

clear." Id. at 259-60; 260, n.16 (emphasis added). The Appellate Division agreed that Mrs. Acuna possessed such a protected liberty interest:

> "Plaintiff is correct that a woman (in Mrs. Acuna's position) may have a fundamental right to her relationship with her child." *Acuna I*, at 511.

(ii) The Pregnant Mother Contemplating Abortion Has A Constitutionally Protected Interest In Making Decisions About The Welfare Of Her Child

When a pregnant mother considers an abortion, the decision she is about to make implicates interests of the pregnant mother that are far different from those implicated when making decisions about other medical procedures. In deciding whether to undergo an abortion, however, the mother is making a judgment not only for herself but also for a second patient, the unborn child. In New Jersey the doctor has a duty to the unborn child to disclose the risks and consequences of the procedure to the child by informing the mother of those risks. *Draper v. Jasionowski*, 372 N.J. Super. 368, 376-379 App. Div. 2004). In the context of abortion, the doctor is proposing that he terminate the life of one of his patients to whom he owes a duty. His authority to do so is the mother's consent, upon which he relies as the instrument that extinguishes his duty to his second patient. The pregnant mother cannot make an informed decision for her child, or herself, if she does not know unequivocally that the second patient already exists, and that the abortion will terminate that patient's life. The pregnant mother possesses a second constitutionally protected interest; her constitutional right to make informed decisions relating to the welfare of her child. *Meyer v. Nebraska*, 262 U.S. 390 (1922); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000).

(iii) The Wrongful Death Statute as it is Applied to Mrs. Acuna's Circumstance Must be Strictly Scrutinized: The Framework Established by *Levy*, *Glona* and *Weber*

Some of the principles applicable to this case are those applied in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. American Guaranty*, 391 U.S. 73 (1968), and *Weber v. Aetna*, 406 U.S. 164 (1972). Each involved wrongful death statutes which excluded subclasses from their protection which were found to violate the Equal Protection Clause. Because the protected interests of the mother in her relationship with her child are considered "fundamental" (*Santosky v. Kraemer*, 455 U.S. 745 (1982)), and are implicated by the wrongful death statute (*Levy*, at 71), the strict scrutiny standard of review must be employed. However, the mother's constitutionally protected fundamental interests in her relationship with her child, and her right to make an informed decision about the welfare of her child are directly implicated in a unique way in the context of Mrs. Acuna's contemplation of an abortion

Neither *Levy* nor *Glona* expressly imposed strict scrutiny for two essential reasons: (1) the plaintiffs in those cases did not raise the strict scrutiny standard and was, therefore, not before the Court; and (2) the Supreme Court had not, as of 1968, determined whether the relationship between a parent and a child born out of wedlock enjoyed constitutional protection. See, *Stanley v. Illinois*, 405 U.S. 645 (1972). However, it is clear that the holdings in *Levy* and *Glona* were significantly influenced by the fact that the wrongful death statute implicated the relationship between mother and child.

> The rights asserted here involve the intimate, familial relationship between a child and his own mother. *Levy*, 391 U.S. at 71.[2]

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2. Three years later, the Supreme Court upheld a statute which excluded a class of illegitimate children from recovering under intestacy laws. *Labine v. Vincent*, 401 U.S. 532 (1971). In 1972, distinguishing *Levy* and *Glona* from *Labine*, the Court in *Weber v. Aetna*, supra, relied exclusively upon the purposes of the different statutes and the different interests which those statutes sought to

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The results in *Levy*, *Glona* and *Weber*, did not hinge on the fact the class discriminated against were illegitimates. Rather, the results were dictated by the familial interests in the relationship between a mother and her child, and how those interests related to the purpose of the statute. When faced with a state termination of the relationship between a parent and his illegitimate child the Court cited *Levy* and *Glona* as authority to establish that the relationship between the parent and the illegitimate child was protected by Due Process. *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

Subsequently, *Weber* held that because the wrongful death portion of Louisiana's worker's compensation statute implicated personal interests the classification violated equal protection. In doing so, the Court imposed strict scrutiny:

> [W]hen state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. [citations omitted]. 406 U.S. at 172-73. Whatever the merits elsewhere of this contention [promoting the state's interest in protecting "legitimate family relationships"], it is not compelling in a statutory compensation scheme...[for the death of a family member]" 406 U.S. at 173. "...the classification is justified by no legitimate state interest compelling or otherwise." *Id.* at 176.

The majority's imposition of strict scrutiny was criticized by Justice Rehnquist in his dissent. See, Rehnquist dissenting, 406 U.S. at 177-185. The *Stanley* decision, which expressly held that the parent of an illegitimate child had a protected due process liberty interest, had been issued twenty-one days before *Weber*, and explains why the heightened scrutiny was employed in *Weber*, but not in *Levy* or *Glona*. Although Justice Rehnquist protested that he did not know which "personal liberty" the majority said was implicated, (at 183), it is clear that the Court

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protect. The familial interests in the relationship between close family members protected by the wrongful death statute (*Glona* and *Levy*) and the wrongful death compensation statute (*Weber*) were not involved in *Labine* even though the class of persons discriminated against involved illegitimate children in all four cases. *Weber*, at 170-74.

referred to the interest in the relationship between parent and child. Neither the majority nor the dissent in *Weber* made mention of a suspect or "quasi" suspect classification, only a "personal liberty." *Weber* emphasized the nature of the loss to the survivors involved (406 U.S. at 169-174), as did *Levy* (391 U.S. at 71).

The imposition of strict scrutiny in this case is consistent with Supreme Court cases which recognize that: [1] once a state extends a benefit to those within its borders which implicates fundamental rights, it can justify excluding some individuals from that benefit only if the classification promotes a compelling state interest;[3] and [2] where a state statute excludes some persons from a benefit which is not itself a "fundamental right", but the act of excluding a particular class of individuals influences private conduct which affects a fundamental right, only a compelling state interest can justify the classification.[4]

The mother to whom abortion is proposed is involved in a decision of whether or not to give up her fundamental rights and to terminate the child's life. When the waiver of her fundamental rights is uninformed because of the doctor's breach of duty, the conduct of the doctor uniquely and directly affects the mother's relationship by deliberately terminating it. It is the doctor's intent to terminate her relationship by terminating the life of her child. His failure to discharge his duty to disclose, and his act in performing the procedure, is the direct cause of the mother's loss of her fundamental right. Thus, the mother is denied the very

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3. See, e.g. *Harper v. Virginia*, 383 U.S. 663 (1966) (the state was not required to create a particular right to vote, but once it did, the state was required to extend the right to all, absent a compelling state interest); *see also Kramer v. Union Free Sch. Dist.*, 395 U.S. 21 (1969); *Oregon v. Mitchell*, 400 U. S. 112, 238 (1970). For cases involving free speech, *see Carey v. Brown*, 445 U.S. 455 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

4. See, e.g. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirement in order to receive welfare benefits (to which one has no right) negatively impacts fundamental right to travel). *See also Mem. Hospital v. Maricopa County*, 415 U.S. 250(1974), and *Dunn v. Blumstein*, 405 U.S. 330, 338-42 (1972). In this latter line of cases, strict scrutiny is imposed because the statute may deter private travel. "But, even if travel is not deterred, strict scrutiny is imposed because the act of travel" is "penalized" in the sense that the traveler does not receive a benefit others receive, even though he has no "right" to the benefit. *See Dunn*, 405 U.S. at 338-42.

cause of action which is intended to deter conduct which terminates her rights.

2. New Jersey Has No State Interest that is Either Compelling or Rational Which Is Promoted by the Classification Drawn by the Wrongful Death Statute as Applied in the Context of Abortion.

Giardina v. Bennett, 111 N.J. 412 (1988) identified only one reason why the plaintiff is unprotected by the wrongful death statute: the Nineteenth Century Legislature erroneously believed that an "unborn child" was "merely a part of his mother without separate existence or personality" (citing *Smith v. Brennan*, 31 N.J. 353, 356 (1960)). *Giardina,* at 421.

(a) Where the Death Occurs Is Irrelevant to the Purpose of the Statute

The interests served by the statute is the State's interest in protecting the mother's relationship with her child (*Green v. Bittner*, 424 A.2d 210 (1980); *Volk v. Baldazo*, 651 P.2d 11, 15 (Id. 1982); *Dunn v. Roseway, Inc.*, 333 N.W. 2d 830, 833 (Iowa 1983); *Farley v. Sartin*, 466 S.E. 2d 528 (W. Va. 1995); *Espadero v. Feld*, 649 F. Supp. 1483 (D. Colo. 1986); *Gentry v. Gilmore*, 613 So.2d 1241, 1245 (Ala. 1993); see also, Stuart M. Speiser, *Recovery for Wrongful Death*, §3.47 n.90 at 317, §3.53 at 336 (Lawyers Co-op, 2d 3d. 1975)), and the protection of the lives of human beings. (*See* p.15-16; 29; 6-7; *supra); Green v. Bittner, supra.; Farley v. Sartin*, 466 S.E.2d at 531; *Espadero v. Feld*, 649 F. Supp at 1483; *Volk v. Baldazo*, 651 P.2d at 15. The creation of the wrongful death cause of action was the method New Jersey chose to protect these legitimate interests. The State defines the cause of action by establishing the elements of the claim which must be proven. Plaintiffs can prove all of the elements of the claim.

The *issue before the Court is how does the exclusion from liability of a tortfeasor's conduct which results in the death of the child in utero promote the purpose of the statute which is intended to deter that very conduct? Weber v. Aetna*, 406 U.S. at 172-73, 175; *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Levy v. Louisiana, supra; Griffin v. Illinois*, 351 U.S. 12 (1956). Whether the injured child's death is pre-birth or post-birth bears no relationship to the purpose of the statute or elements of the claim. The mother's loss is exactly the

same in either event. *Farley v. Sartin*, 466 S.E.2d at 533-534 (The loss is the same before "viability" as after, and the wrong committed is identical); See, *Smith v. Brennan*, Supra. The State's irrational declaration that plaintiffs' children never existed does not constitute a "state interest" promoted by the classification. Rather it is the pointless demarcation line which draws an irrational subclassification.

(b) There is No Legitimate State Interest Promoted by the Discriminatory Classification

In *Alexander v. Whitman*, 114 F.3d 1392 (1997), the Third Circuit identified only one alleged "state interest" promoted by the wrongful death statute: New Jersey's "interest in defining who is entitled to recover for injuries and in setting limits on tort recovery for wrongful death." *Id.*, at 1406-08. *Alexander* asserted that by creating the discriminatory sub-class of mothers this interest is promoted because the classification "eliminates the nearly impossible problems of proof inherent" in proving "injuries" to a "fetus". Id. at 1405.

Alexander's statement that the reason for the discriminatory classification concerns the difficulty of proving the injury and death of a child in utero conflicts with New Jersey's controlling case law. *Smith*, 31 N.J. 353 (1960) expressly rejected the argument that proof of injuries which occur in utero is too difficult to allow recovery for such injuries. *Id* at 365. Such proofs are routinely introduced in New Jersey Courts and a wrongful death claim may be brought when an injury to a "fetus" in utero results in death. *Carey v. Lovett*, 132 N.J. 49 (1993). The proof necessary to establish the cause of injury and death in a pre-birth death case is identical to the proofs necessary if the same injury resulted in a post-birth death.

Alexander conflicts with *Giardina v. Bennett*, 111 N.J. 412 (1988). *Giardina* held that in an emotional distress claim the plaintiff is allowed to introduce *exactly* the same evidence necessary to prove the injury and cause of death for the wrongful death in a pre-birth death case. Further, *Giardina* emphasized that "difficulty of proof" concerning damages is not the reason for the discriminatory classification:

> We note that under *Smith, supra,* a child may recover for tortiously inflicted prenatal injuries, and find that this satisfies the requirement limiting recovery to situations where the decedent's death was one " such as would, if death had not ensued, have entitled the person injured to maintain an action for damages, resulting from injury." *Giardina,* at 427, n.2...Our reasons for not adopting a more expansive interpretation of the statutory term "persons" in this context *do not relate to the speculative nature of damages* that would occur if fetal death qualified as any actionable wrongful death under the act. This concern has not discouraged our recognition or the need for recovery in similar cases in recent years. (Citing *Green v. Bittner,* 85 N.J. 1 (1980)). *Giardina,* at 427, 428. (emphasis added).

Not only does *Green v. Bittner* express no concern about "difficulty of proof," the New Jersey Supreme Court, subsequent to *Giardina,* made it clear that Wrongful Death damages are recoverable for the death of an unborn child for injuries sustained in utero which results in death immediately after live birth. *Carey v. Lovett,* 132 N.J. 44 (1993). There is no difference in the proofs necessary where the death occurs pre-birth or shortly after birth.

The only reason for *Giardina's* interpretation of the Wrongful Death Statute as excluding this class of mothers was the Court's clearly stated belief that the Nineteenth Century legislature had not "intended to" include the loss of the unborn child who dies in utero as a family member whose death was compensable to the surviving parents. *Giardina,* at 428; See, also, *Giardina* at 421 (the legislature erroneously believed the unborn child was "merely part of his mother"). The fact that the State allows the same proofs in other contexts is a concession by the State that there are no problems of proof, and the U.S. Supreme Court has held in such circumstances that "problems of proof" can not be used as an excuse to discriminate against a particular class of litigants.[5] *Clark v. Jeter,* 486 U.S. 456, 462-465; See also, *Pickett v.*

5. On the one hand, *Alexander* claims the classification is rational because the state law considers proof of the causal connection between negligence and

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Brown, 462 U.S. 1, 10-11 (1983). "Problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). The Appellate Division was equally disingenuous:

> "Simply stated, the act focuses on dependency and pecuniary loss. As such, its classifications are rationally related to its purpose." *Acuna*, at 512.

The problem with this, of course, is that the statute does not require dependency. *Cassano v. Durham*, 180 N.J. Super. 620 (L. Div. 1981); *Wolff v. Mercer Med. Cent.*, 220 N.J. Super. 360 (App. Div. 1987); *Housen v. Olesky*, 71 N.J. Super. 95 (App. Div. 1962); *Bohr v. Penn R. Co.*, 23 N.J. Super. 399 (App. Div. 1956); See, N.J.S.A. 2A:31-4. The parents of the child injured in utero in *Carey v. Lovett*, born alive at 26 weeks gestation who died only days later, were not dependant upon the premature child; yet they are allowed recovery under the act.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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death too difficult in *Alexander's* attempt to dismiss the equal protection claim presented to the Court; on the other hand *Alexander* relied upon the existence of the emotional distress claim which permits those very proofs on causal relationship where *Alexander* is attempting to argue around the due process argument. *Alexander*, at 1405-06.

APPENDIX

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED APRIL 7, 2006

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Rosa ACUNA Administratrix Ad Prosequendum and General Administratrix of the Estate of Andres Acuna,[1] Deceased Infant and Rosa Acuna Individually,

Plaintiffs-Appellants,

v.

Sheldon C. TURKISH, M.D., and the Obstetrical and Gynecological Group of Perth Amboy-Edison, P.C.,

Defendants-Respondents.

Argued April 18, 2005.
Decided April 7, 2006.

Before Judges A.A. RODRÍGUEZ, CUFF and HOENS.

The opinion of the court was delivered by RODRÍGUEZ, A. A., P.J.A.D.

Plaintiff, Rosa Acuna, appeals from the summary judgment dismissing her complaint against defendants

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1. The second amended complaint refers to "Michael Doe, (fictitious name of a real individual), deceased infant." The third amended complaint refers to "Andres Acuna, deceased infant."

Appendix A

Sheldon C. Turkish, M.D. and his medical group, the Obstetrical and Gynecological Group of Perth Amboy-Edison, P.C. (collectively "defendants"). We reverse.

Some aspects of the dispute between these parties were the subject of an earlier decision of this court. *See Acuna v. Turkish,* 354 *N.J.Super.* 500, 808 *A.*2d 149 (App.Div.2002). Because that decision bears directly on the issues now before us, we must first set out the essential facts and the procedural history of this litigation.

At the time of the events in question, Acuna was twenty-nine years old. She was married and was the mother of two daughters. Those children had been born of Acuna's second and third pregnancies, her first pregnancy having ended in a miscarriage in 1993. On April 6, 1996, Acuna consulted Turkish, an obstetrician and gynecologist who had delivered Acuna's second child, because she was suffering from abdominal pain.

After Turkish examined Acuna, he advised her that she was pregnant for the fourth time. The pregnancy was in its sixth to seventh week. He also advised her that she should terminate the pregnancy for medical reasons. According to Acuna, Turkish told her that she "needed an abortion because [y]our kidneys are messing you up." Since the time she had been in high school, Acuna had suffered from renal glycosuria, a disorder of the kidneys. Acuna asked Turkish whether "the baby was already there." According to Acuna, Turkish replied, "Don't be stupid, it's only blood."

Appendix A

At her deposition, Acuna shed some light on her understanding of the word "pregnant." She testified that, "[O]bviously I knew I was pregnant, I just needed to know and I wanted to know if the baby was-if there was a baby already in me." In the following deposition excerpt, Acuna further explained her understanding of what it means to be pregnant.

> [TURKISH'S COUNSEL]: Q. What did that word pregnant mean to you in your mind in January 1993 [the time of her miscarriage]?
>
> [ACUNA'S COUNSEL]: A. As long as you give the month, that was fine.
>
> [ACUNA]: That eventually somewhere down the line I was going to have a baby.
>
> [TURKISH'S COUNSEL]: Q. In your mind in January of 1993, more specifically than somewhere down the line you're going to have a baby, what in your mind was happening inside your body in January of 1993?
>
> [ACUNA]: A. I didn't know exactly what was happening inside my body. I knew I had gotten pregnant but I didn't know exactly what was forming inside my body at this moment.

Following the April 6, 1996 examination by Turkish, Acuna discussed the physician's advice with her husband. Three days later, she signed a consent form for an abortion.

Turkish performed a vacuum aspiration. However, Acuna continued to bleed. Seven weeks later, Acuna went to Robert Wood Johnson Hospital where she was diagnosed with an incomplete abortion. Acuna underwent a dilation and curettage. According to her, one of the nurses caring for her explained that the procedure was necessary because Turkish "had left parts of the baby inside of [her]." Thus, Acuna concluded based on the reference to "the baby" that she had given consent to an abortion based on erroneous information.

Acuna filed an eleven-count complaint against defendants and a fictitiously named nurse.[2] There were two amendments to the complaint. The second amended complaint asserted causes of action on behalf of Acuna for medical malpractice and negligent infliction of emotional distress based on lack of informed consent and negligent performance of the abortion. The complaint also alleged causes of action on behalf of "the estate of Michael Doe (ficitious name of a real individual), deceased infant of Rosa Acuna" in the nature of wrongful death and survival claims.

In 2001, defendants moved for summary judgment on the emotional distress, wrongful death, and survival claims. Following oral argument, the motion judge granted defendants' motion and dismissed these claims. Acuna's motion for reconsideration was denied. This court then granted Acuna's motion for interlocutory review of the dismissal of the wrongful death and the emotional distress claims only. We affirmed the dismissal of the wrongful death claim, but reversed the dismissal of the emotional distress

2. The counts alleging causes of action against the fictitiously named nurse were subsequently abandoned.

claim and remanded for further proceedings. *Acuna, supra,* 354 *N.J.Super.* at 505, 808 *A.*2d 149.

As that opinion notes, the review of the summary judgment order as it related to the emotional distress claim rested on the following assumptions: (1) Turkish "owed a duty to [Acuna] to disclose all material information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy;" and (2) Turkish "breached that duty, and the breach was a proximate cause of [Acuna's] choice to undergo the procedure." *Id.* at 514-15, 808 *A.*2d 149.

In that earlier opinion, we rejected the motion judge's conclusion that, although there were factual issues concerning the informed consent issue, Acuna was not entitled to proceed on her informed consent claim because the "fetus"[3] was not a constitutional person. *Id.* at 515, 808 *A.*2d 149. We noted that in *Roe v. Wade,* 410 *U.S.* 113, 158, 93 *S.Ct.* 705, 729, 35 *L.Ed.*2d 147, 180 (1973), the United States Supreme Court held that, "the word 'person' as used in the Fourteenth Amendment does not include the 'unborn.' " Notwithstanding that, we concluded that with respect to Acuna's emotional distress claim:

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3. In our earlier opinion, we used the term fetus because it was the term used by the motion judge to refer to Michael Doe. Medically speaking, the correct term would have been embryo, given the undisputed six to seven week gestational age. Embryo is defined as "in human beings, the developing organism from conception until approximately the end of the second month." A fetus "represents the product of conception from the end of the eight week to the moment of birth." *Stedman's Concise Medical Dictionary,* 326, 375 (2d ed.1994).

Appendix A

> *Roe* is not dispositive here because this is not a case implicating a government's attempt to limit a woman's privacy right to terminate a pregnancy. Crediting plaintiff's proofs, it is about a woman who claims severe emotional distress caused by medical advice resulting in her grudging consent to terminate a pregnancy, purportedly given because of defendant's failure to advise her of the material consequences of the procedure. The fact that a fetus may not be a 'person' under the Fourteenth Amendment is irrelevant because plaintiff's claim is not dependent upon whether or not the fetus enjoys a constitutional status as a 'person.' The claimed malpractice committed by defendant was directed against plaintiff as an expectant mother and thus was a direct, not a derivative claim. *See Giardina*,[4] 111 *N.J.* at 413, 545 *A.*2d 139 ('the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury . . .').

[*Acuna, supra*, 354 *N.J.Super.* at 515, 808 *A.*2d 149.]

We then concluded that Acuna's emotional distress claim is "well founded" pursuant to New Jersey case law, relying on *Giardina* and *Portee v. Jaffee*, 84 *N.J.* 88, 417 *A.*2d 521 (1980). Accordingly, we remanded for resolution of the factual issues regarding informed consent.

4. *Giardina v. Bennett*, 111 *N.J.* 412, 545 *A.*2d 139 (1988).

Following that remand, Acuna filed her third amended complaint, in which she identified Michael Doe as "Andres Acuna" and essentially reasserted all of the claims, including the wrongful death and survival counts that had been dismissed. The parties thereafter engaged in extensive discovery directed to the informed consent issue. In 2003, defendants moved for summary judgment seeking dismissal of all counts of the complaint. A different judge heard the motion. Acuna's counsel conceded to the judge at oral argument that only two claims remained. These claims, both based on the lack of informed consent, are negligent infliction of emotional distress (styled as the *Giardina-Portee* claim), and a claim for physical injury to Acuna. Counsel explained that the claim for negligent performance of the abortion had been abandoned.

The judge granted defendants' motion and dismissed the informed consent claims in a written opinion. Acuna moved for reconsideration and for leave to file a fourth amended complaint. The proposed fourth amended complaint did not assert a new cause of action. According to Acuna's counsel, the amendment "would in much greater detail set forth [Acuna's] uninformed consent negligence claim." The judge denied the motions for reconsideration and for leave to file a fourth amended complaint.

Acuna filed two appeals, one in her individual capacity challenging the dismissal of her informed consent claims (A-4022-03) and one in her capacity as administratrix of the estate of the aborted embryo for its wrongful death (A-4023-03). We calendared these separate appeals back-to-back and we address them in this single opinion.

Appendix A

The Informed Consent Claims (A-4022-03T5)

At the outset we note that Acuna does not allege that the abortion was performed against her will. She concedes that she consented to the procedure, but she argues that she was given insufficient information by Turkish to allow her to make an intelligent, informed decision regarding the abortion. As a result, according to Acuna's expert, she suffered severe emotional and psychological trauma, which led to the development of acute post-traumatic disorder, major clinical depression and psychosexual dysfunction.

Acuna's first contention on appeal is premised on the following statement: "[T]he Appellate Division already ruled in this case that the doctor must disclose that a pregnant mother's unborn child is in existence *before* she can make an informed decision of whether or not to submit to the procedure." Because this premise is not consistent with our previous holding, we are constrained to reiterate our earlier analysis here.

In discussing Acuna's claim for emotional distress pursuant to *Giardina-Portee* based upon lack of informed consent, we said:

> [A] woman's right to determine for herself whether or not to continue or terminate her pregnancy . . . protects a distinctively personal interest, . . . [b]ased on a woman's circumstances and discrete moral and religious beliefs, to choose not to terminate the pregnancy after being informed by her physician regarding the status of

> the fetus and all other facts that may be deemed material in making that choice. The wrongful birth of a baby with a congenital defect may obviously give rise to profound mental anguish. Based on the circumstances, background and beliefs of a mother, inducing her to terminate the pregnancy, even at eight weeks, because of the physician's failure to obtain an informed consent may also result in severe distress and mental anguish.

[*Acuna, supra,* 354 *N.J.Super.* at 518, 808 *A.*2d 149 (citations omitted).]

Requiring a physician to give information "regarding the status of the fetus and all other facts that may be deemed material in making that choice" is very different than requiring a physician to disclose to a pregnant mother that "her unborn child is in existence ***before*** she can make an informed decision on whether or not to submit to the procedure." In *Acuna, supra,* we determined that, in the context of an abortion, the information to be disclosed was fact-sensitive and remanded for development of the record.

Here, Acuna alleges that her consent to an abortion was "uninformed" because Turkish failed to accurately answer her question, "[I]s the baby already there?" More particularly, she argues that "if New Jersey does not require a complete disclosure that helps the mother understand that the life of an ***existing family member*** will be terminated, then [her] protection and due process rights would be violated." (emphasis added).

Based on this articulation of her argument, it is apparent that Acuna considered the embryo, six or seven weeks after conception, to have been "an existing family member." Therefore, she believes that there was a single correct answer to her question. She thus concludes that only an affirmative answer would have discharged Turkish's duty to provide sufficient information to allow her to make an informed decision about an abortion. Defining her claim in this fashion does not help the analysis of this informed consent case. In the informed consent context, the standard to be applied is an objective one. *See Canesi v. Wilson,* 158 *N.J.* 490, 506, 730 *A.*2d 805 (1999). The standard is derived from what a reasonably prudent patient would deem to be significant to a decision rather than what any particular patient believes. *See Largey v. Rothman,* 110 *N.J.* 204, 213, 540 *A.*2d 504 (1988). Obviously, the term "baby" meant something different to Acuna and Turkish. For her, it meant an embryo or fetus; for the doctor, a human being following birth. Arguably, from Turkish's perspective, he answered correctly, and discharged his duty to his patient by indicating that there was no "baby" there.

Although we do not agree with Acuna's interpretation of our earlier opinion or with her argument that there was a single correct answer that Turkish failed to provide, we find merit in her assertion that the judge erred in granting summary judgment. We do so, however, for entirely different reasons than those advanced in Acuna's brief.

It is well-settled that in a non-emergent situation, a physician must obtain a patient's informed consent before the physician may treat or operate on the patient. *Largey,*

supra, 110 *N.J.* at 207, 540 *A.*2d 504; *see also Niemiera v. Schneider,* 114 *N.J.* 550, 555 *A.*2d 1112 (1989). The physician has a duty to explain, in terms understandable to the patient, what he or she intends to do before subjecting the patient to a course of treatment or an operation. *Matter of Farrell,* 108 *N.J.* 335, 347, 529 *A.*2d 404 (1987). The reason for the existence of this duty is to protect each person's right to self-determination in matters of medical treatment. *Ibid.* "Physicians ... have a duty to evaluate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances." *Matthies v. Mastromonaco,* 160 *N.J.* 26, 34, 733 *A.*2d 456 (1999).

In order to obtain the patient's informed consent, the physician must tell the patient not only about the alternatives that he or she recommends, but also about all medically reasonable alternatives that the doctor does not recommend. *Id.* at 37, 733 *A.*2d 456. The physician has a duty to explain, in words the patient can understand, all material medical information and risks. Medical information or a risk of a medical procedure is material when a reasonable patient in the plaintiff's position would be likely to attach significance to it in deciding whether or not to submit to the treatment. *Id.* at 37-39, 733 *A.*2d 456; *see Canesi, supra,* 158 *N.J.* at 511 n. 5, 730 *A.*2d 805. Moreover, a physician does not adequately discharge his or her responsibility by disclosing only the treatment alternatives that are recommended. *Matthies, supra,* 160 *N.J.* at 37-39, 733 *A.*2d 456. "Accordingly, the physician should discuss the medically reasonable courses of treatment, including non-treatment" and their attendant probable risks and outcomes. *Id.* at 38, 733 *A.*2d 456.

Applying these well-settled principles of informed consent to this record, we must reverse the summary judgment dismissing Acuna's emotional distress claim. The issue presented here is quite narrow, i.e., what medical information is material and must be disclosed by an obstetrician when advising a patient to terminate a pregnancy and what medical information is material when the patient asks if the "baby" is already "there?"

In addressing this question, the standard against which Turkish's communication with Acuna should be measured is not a legal issue to be defined by this court. Nor is it established by expert testimony. *See Largey, supra,* 110 *N.J.* at 213-14, 540 *A.*2d 504. Rather, "[w]henever non-disclosure of particular risk information is open to debate by reasonable-minded [people], the issue is one for the finder of facts." *Id.* at 213, 540 *A.*2d 504 (quoting *Canterbury v. Spence,* 464 *F.*2d 772, 788 (D.C.Cir.), *cert. denied,* 409 *U.S.* 1064, 93 *S.Ct.* 560, 34 *L. Ed.*2d 518 (1972)); *see Sgro v. Ross,* 337 *N.J.Super.* 220, 226, 766 *A.*2d 1147 (App.Div.1998), *aff'd,* 166 *N.J.* 338, 765 *A.*2d 745 (2001). Therefore, while both parties are free to present testimony of experts who are deemed by the trial court to be qualified to testify and to express an opinion, the finder of fact ultimately will be required to address that debate in the context of the reasonably prudent patient standard.

Here, accepting Acuna's version of the facts as true, *see Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 540, 666 *A.*2d 146 (1995), we conclude that summary judgment was inappropriate because a reasonable patient would not have received the information necessary to make an informed

decision. Because we conclude that summary judgment should be reversed, we do not address Acuna's additional arguments that "it was error for the Law Division to dismiss the complaint on the ground the complaint only alleged the doctor failed to make a single disclosure" or that "it was further error for the court to deny Acuna to amend the complaint."

The Wrongful Death Claim (A-4023-03T5)

Acuna contends that the dismissal of the wrongful death claim under *N.J.S.A.* 2A:31-1 to -6 violated her right to equal protection of the law. As already noted, in the earlier appeal, we affirmed the dismissal by the first motion judge of the wrongful death claims. *Acuna, supra,* 354 *N.J.Super.* at 507-13, 808 *A.*2d 149. An appellate decision on the merits is final though it does not terminate the case, and it becomes the law of the case. *State v. Myers,* 239 *N.J.Super.* 158, 164, 570 *A.*2d 1260 (App.Div.), *certif. denied,* 127 *N.J.* 323, 604 *A.*2d 598 (1990). Such a decision is not tentative, or subject to later review. *Ibid.* Generally, "[p]rior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." *Sisler v. Gannett Co., Inc.,* 222 *N.J.Super.* 153, 159, 536 *A.*2d 299 (App.Div.1987), *certif. denied,* 110 *N.J.* 304, 540 *A.*2d 1283 (1988). The doctrine is more stringent when applied to an appellate decision in the same case than it is when applied to prior trial court decisions in the same case. *In re SMB Assocs. v. Dep't of Envtl. Prot.,* 264 *N.J.Super.* 38, 60, 624 *A.*2d 14 (App.Div.1993), *aff'd,* 137 *N.J.* 58, 644 *A.*2d 558 (1994).

Here, the evidence and arguments presented following the remand are not substantially different. Therefore, we decline to address, for a second time, the merits of the issues raised in A-4023-03T5.

Summarizing, we reverse the summary judgment entered on Acuna's informed consent claim in A-4022-03T5 and we remand that matter for further proceedings consistent with this opinion, and we decline to address the issues raised in A-4023-03T5.

Reversed and remanded for further proceedings.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED OCTOBER 29, 2002

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Rosa ACUNA, Administratrix ad Prosequendum of the Estate of Michael Doe (fictitious name of a real individual), deceased infant of Rosa Acuna, General Administratrix of the Estate of Michael Doe (fictitious name of a real individual), deceased infant of Rosa Acuna, and Rosa Acuna, individually,

Plaintiffs-Appellants,

v.

Sheldon C. TURKISH, M.D., Obstetrical and Gynecological Group of Perth Amboy-Edison, a Partnership or P.C. organized under the State of New Jersey, Janet Jones, R.N. (a fictitious name of a real individual),

Defendants-Respondents.

Argued Sept. 17, 2002.
Decided Oct. 29, 2002.

Before Judges HAVEY, A.A. RODRIGUEZ and PAYNE.

The opinion of the court was delivered by

HAVEY, P.J.A.D.

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This is a medical malpractice, informed consent case. The gravamen of the complaint, filed by plaintiff Rosa Acuna individually, and in her capacity as Administratrix of the Estate of "Michael Doe," is that defendant Dr. Sheldon C. Turkish (defendant), a medical doctor specializing in the field of obstetrics and gynecology, failed to obtain an informed consent from plaintiff before terminating her pregnancy. Specifically, plaintiff claimed that defendant "failed to inform her that [the fetus, Michael Doe], although a person unborn, was a complete, separate, unique and irreplaceable human being. . . ."

By leave granted, plaintiff appeals from an order for summary judgment dismissing counts one and two of her complaint setting forth a wrongful death cause of action against defendant and his medical group, in which she seeks to recover pecuniary loss "as the result of the death of the child. . . ." Plaintiff also appeals from the dismissal of count five, setting forth a cause of action for her emotional distress suffered as a result of the "loss of her son."

We affirm dismissal of the wrongful death counts. The Wrongful Death Act, *N.J.S.A.* 2A:31-1 to -6, "does not permit recovery attributable to the wrongful death of an infant before birth." *Giardina v. Bennett,* 111 *N.J.* 412, 413, 545 *A.*2d 139 (1988). We reject plaintiff's argument that depriving her of a wrongful death remedy violates the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution.

However, we reverse dismissal of plaintiff's emotional distress claim. In the event plaintiff establishes a medical

malpractice claim based on a lack of informed consent, defendant's tortious conduct constitutes a direct tort against plaintiff, entailing emotional distress and mental suffering arising from the loss of a fetus.[1]

I

The evidentiary material considered in a light most favorable to plaintiff, *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 666 *A.*2d 146 (1995), presents the following factual background. On April 6, 1996, plaintiff consulted Dr. Turkish because of abdominal pain. At the time, plaintiff was twenty-nine years of age and had two children, two and one-half years and nine months old, the latter having been delivered by defendant by caesarian section. Defendant examined plaintiff and, and according to plaintiff, advised her that she was pregnant and needed an abortion because "[y]our kidneys are messing you up." Plaintiff interpreted defendant's diagnosis and warnings to mean that, without an abortion, she only had three months to live. In his deposition, defendant testified that he performed a pelvic examination and administered a sonogram, which revealed that the gestational age of the fetus was approximately seven weeks old.

Plaintiff was not concerned how the termination of pregnancy would be performed. Rather, she asked defendant

1. Plaintiff has not appealed from the trial court's dismissal of counts three and four, asserting a survivorship claim. Count six, plaintiff's claim against defendant that he negligently performed the abortion, count eleven, for personal injury to plaintiff against all defendants, and counts seven through ten, against an unidentified nurse, are not the subject of this appeal.

whether "the baby was already there." She testified in her deposition that "[o]bviously I knew I was pregnant, I just needed to know and I wanted to know if the baby was-if there was a baby already in me." By baby, she meant "human being" or "[l]ife in there." According to plaintiff, defendant replied "don't be stupid, it's only blood." Defendant testified he did not remember plaintiff asking that question, but acknowledged that if a patient had asked it, he would have answered that a "seven-week pregnancy is not a living human being."

On April 9, 1996, plaintiff signed a consent form for a termination of pregnancy (TOP), which stated in its entirety, "I hereby give my consent for Dr. Turkish to perform a TOP. He has explained all the risks and complications to me." On April 9, 1996, defendant performed a vacuum aspiration.[2] Defendant admitted that the vacuum aspiration procedure "in fact, kills the fetus." However, plaintiff continued to bleed for several weeks and, on May 4, 1996, the bleeding became extremely heavy. She was taken to Robert Wood Johnson Hospital where she was diagnosed with an incomplete abortion. At the hospital, plaintiff underwent a dilatation and curettage (D and C). According to plaintiff, the nurse caring for her explained that the procedure was necessary because "the [previous] doctor [defendant] had left parts of the baby inside of you."

Plaintiff's expert, Theresa Karminski Burke, a psychologist, concluded that, as a result of the termination

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2. According to plaintiff, she is prepared to prove at trial that her "child" was eight weeks old on April 9, 1996.

of pregnancy, plaintiff suffered severe emotional and psychological trauma, which led to the development of acute post-traumatic stress disorder, obsessive compulsive disorder, major clinical depression and psychosexual dysfunction.

In granting summary judgment to defendants dismissing both the wrongful death and emotional distress counts, the trial court viewed the central issue as being whether "a six to eight week fetus is a constitutional person; and the answer is no." Citing *Roe v. Wade,* 410 *U.S.* 113, 93 *S.Ct.* 705, 35 *L.Ed.*2d 147 (1973), the trial court reasoned that, although it sympathized with plaintiff's argument, it "must adhere to the fact that the highest Court of this country has held that a fetus is not a human being under our constitution." Consequently, the wrongful death claim "must be dismissed." Citing *Portee v. Jaffee,* 84 *N.J.* 88, 417 *A.*2d 521 (1980), the court concluded that the fetus' lack of status as a "constitutional person" also precluded a cause of action by plaintiff for negligent infliction of emotional distress, since that cause of action requires proof of an intimate, familial relationship between plaintiff and an injured "person."

II

WRONGFUL DEATH CLAIMS

Plaintiff first argues that the trial court erred in dismissing her wrongful death claims under counts one and two.

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The Wrongful Death Act provides in *N.J.S.A.* 2A:31-1:

> When the death of a *person* is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the *person* injured and although the death was caused under circumstances amounting in law to a crime.

[Emphasis added.]

Plaintiff acknowledges that the Supreme Court in *Giardina, supra,* 111 *N.J.* at 413, 545 *A.*2d 139, held that the Act "does not permit recovery attributable to the wrongful death of an infant before birth." The Court so held after reviewing the legislative history of the Act. It observed:

> The distinctive statutory nature of this derivative cause of action, the historical origins of this statute and the subsequent history and evolution of the Wrongful Death Act in this state suggest that the traditional definition of "person" under the Act be retained. We are persuaded ultimately because we find no compelling underlying policy that would impel us to give the statutory term "person" an expansive interpretation here.

[*Id.* at 427, 545 *A.*2d 139.]

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Nevertheless, plaintiff challenges the constitutionality of the Act as applied in *Giardina.* She argues that denying her recovery under the Act, "in light of the fact that she can prove every element of the claim and [that] she sustained exactly the same loss as mothers who are allowed recovery," violates her Equal Protection Rights under the Fourteenth Amendment of the United States Constitution. She observes that, under *Giardina,* "[i]f a child is injured in utero, at any age of gestation, but lives but for a moment outside the mother, Wrongful Death damages may be recovered. If the same child, at the same age, is injured in utero by the same tortious act, but his death ensues in the mother's body, the mother may not recover these damages." She reasons that this distinction is irrational because a mother's entitlement to wrongful death damages should "not depend on where her child happened to be at the time the death ensued. . . ." Plaintiff adds that this "irrational" distinction frustrates the Wrongful Death Act's purpose of protecting *all mothers,* as well as the sanctity of life.

A similar argument was presented to and rejected by the Third Circuit in *Alexander v. Whitman,* 114 *F.*3d 1392, 1400 (3rd Cir.), *cert. denied,* 522 *U.S.* 949, 118 *S.Ct.* 367, 139 *L.Ed.*2d 286 (1997). There, the court determined that a mother "can only establish a [wrongful death] claim on behalf of her child . . . if her child . . . fall(s) within the protections afforded 'person [s]' as that term is used in the Fourteenth Amendment, and it is clear that it does not." *Id.* at 1400 (citing *Roe v. Wade, supra,* 410 *U.S.* at 158, 93 *S.Ct.* at 729, 35 *L.Ed.*2d at 180, holding that the word "person" as used in the Fourteenth Amendment does not include the unborn). The court added that the fact that plaintiff's pleadings and

expected proofs support the conclusion that a fetus was a "human being" did not alter the legally established definition of "persons" under the Fourteenth Amendment. *Alexander, supra,* 114 *F.*3d at 1401.

Plaintiff dismisses the holdings in *Roe* and *Alexander* on the basis that she does not challenge the statutory classification of pre-birth fetus and born children. Rather, she seeks equal protection for herself as a mother, a member of a constitutionally protected class, who has the same relationship with her fetus as mothers who **154 give birth to live babies. She adds that because the Wrongful Death Act implicates a mother's fundamental interest in her relationship with her child, the "strict scrutiny" standard applies, and thus only a compelling state interest can justify the distinction made by the *Giardina* Court.

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend XIV, § 1. This protection has been explained as follows:

> The equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed.

[*Washington Nat'l Ins. Co. v. Board of Review,* 1 *N.J.* 545, 553, 64 *A.*2d 443 (1949).]

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The equal protection guarantee applies to the decisions of the courts as well as to the acts of the Legislature. *Jersey Shore Med. Center-Fitkin Hosp. v. Baum's Estate,* 84 *N.J.* 137, 145, 417 *A.*2d 1003 (1980). Also, " '[f]ederal equal-protection analysis employs different tiers of review: strict scrutiny when an act involves a fundamental right or a suspect class; intermediate scrutiny when an act involves a semi-suspect class; and minimal rational-basis scrutiny in all other cases.' " *McCann v. Clerk, City of Jersey City,* 167 *N.J.* 311, 325, 771 *A.*2d 1123 (2001) (quoting *Drew Assocs. v. Travisano,* 122 *N.J.* 249, 258, 584 *A.*2d 807 (1991)).

In support of application of the strict scrutiny test, plaintiff relies on the United States Supreme Court's decisions in *Levy v. Louisiana,* 391 *U.S.* 68, 88 *S.Ct.* 1509, 20 *L.Ed.*2d 436 (1968); *Glona v. American Guar. & Liab. Ins. Co.,* 391 *U.S.* 73, 88 *S.Ct.* 1515, 20 *L.Ed.*2d 441 (1968); and *Weber v. Aetna Cas. & Sur. Co.,* 406 *U.S.* 164, 92 *S.Ct.* 1400, 31 *L.Ed.*2d 768 (1972). In *Levy,* the Court declared unconstitutional on equal protection grounds a Louisiana statute denying illegitimate children the right to maintain an action for their mother's wrongful death. 391 *U.S.* at 71, 88 *S.Ct.* at 1511, 20 *L.Ed.*2d at 439. In *Glona,* the Court held that Louisiana violated the Equal Protection Clause by denying statutory recovery by surviving mothers for the wrongful death of illegitimate children. 391 *U.S.* at 75, 88 *S.Ct.* at 1516, 20 *L.Ed.*2d at 443. Finally, in *Weber,* the Court held that a Louisiana workmen's compensation statute that denied wrongful death benefits to a dependent, unacknowledged illegitimate child that were provided to legitimate and to acknowledged illegitimate children violated

the Equal Protection Clause of the Fourteenth Amendment. 406 *U.S.* at 173-76, 92 *S.Ct.* at 1405-07, 31 *L.Ed.*2d at 779.

Contrary to plaintiff's argument, the cited cases applied the "rational basis," rather than the "strict scrutiny" test. *See e.g., Levy, supra,* 391 *U.S.* at 71, 88 *S.Ct.* at 1511, 20 *L.Ed.*2d at 439 ("[t]hough the test has been variously stated, the end result is whether the line drawn is a rational one"). Although *Levy* observed that "[t]he rights asserted here involve the intimate, familial relationship between a child and his own mother," the Court's holding is based on irrational classification, not interference with that relationship. *Ibid.* "When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate?" *Ibid.* In each case, no rational basis for the statutory distinction was present, and no state interest in legitimate family relations was being served. *Weber, supra,* 406 *U.S.* at 175, 92 *S.Ct.* at 1406, 31 *L.Ed.*2d at 778-79; *Glona, supra,* 391 *U.S.* at 75, 88 *S.Ct.* at 1516, 20 *L.Ed.*2d at 443.

Here, as well, we find no fundamental rights implicated by *Giardina's* holding that the Wrongful Death Act does not permit recovery attributable to the wrongful death of a fetus. Plaintiff is correct that a woman may have a fundamental right to a relationship with her child. *See In re Baby M,* 109 *N.J.* 396, 447, 537 *A.*2d 1227 (1988) ("the rights of personal intimacy, of marriage, of sex, of family, of procreation . . . are fundamental rights protected by both the federal and state Constitutions"). However, plaintiff's premise is contradicted by the terms of the Wrongful Death Act itself. Nothing in

the Act attempts to classify mothers, or give them special status based on whether or not they are pregnant, nor does the statute, on its face, focus on any special familial relationship or even the sanctity of life.

Moreover, as applied by *Giardina,* nothing in the Act interferes with a mother's relationship with her fetus. Whether or not a mother's relationship with her unborn child is a fundamental right is not dispositive because the Act does not affect plaintiff's "relationship" with her unborn child. As the *Alexander* court observed, "[a] mother's relationship with her fetus is exactly the same whether or not she can bring a wrongful death or survivor action. It is not the relationship that is affected here, it is the ability to recover for the loss of that relationship." *Alexander, supra,* 114 *F.*3d at 1404. It is difficult to imagine, for example, that a mother would consider the availability or nonavailability of a wrongful death remedy in making her choice whether or not to terminate her pregnancy in the informed consent context. *See ibid.* ("[i]t is impossible for us to imagine that any such decision [the mother made or might have made about her stillborn child] would be the least bit influenced by whether or not a mother could bring a wrongful death or survival action to recover damages for the loss of a fetus").

Absent a fundamental right, suspect class or semi-suspect class, we do not hesitate to apply the rational basis test in this case. The question is whether the challenged statute is supported by any "conceivable rational basis." *Greenberg v. Kimmelman,* 99 *N.J.* 552, 563, 494 *A.*2d 294 (1985). "The equal protection guarantee is offended only if the classification is wholly unrelated to the legislative objective."

In re Regulation of Operator Serv. Providers, 343 *N.J.Super.* 282, 324, 778 *A.*2d 546 (App.Div.2001). In applying that standard, we find no indiscriminate classification. " 'The fundamental purpose of the wrongful death action is to compensate survivors for the pecuniary losses they suffer because of the tortious conduct of others.' " *Smith v. Whitaker*, 160 *N.J.* 221, 231, 734 *A.*2d 243 (1999) (quoting *Alexander, supra*, 114 *F.*3d at 1398); *see also LaFage v. Jani*, 166 *N.J.* 412, 430, 766 *A.*2d 1066 (2001) ("our Wrongful Death Act is remedial in nature and is designed 'to compensate surviving dependents for the pecuniary losses resulting from the death' of, in many cases, the 'breadwinner' "; quoting *Kibble v. Weeks Dredging & Constr. Co.*, 161 *N.J.* 178, 189, 735 *A.*2d 1142 (1999)). Simply stated, the Act focuses on dependency and pecuniary loss. As such, its classifications are rationally related to its purpose. *See N.J.S.A.* 2A:31-4 ("[t]he amount recovered . . . shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same. If any of the persons so entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury").

Moreover, *Giardina's* application of the Act does not leave an aggrieved mother without a remedy. The Court accommodates the rights of parents by recognizing a common law cause of action to recover for emotional distress and mental anguish arising from the death of an infant before birth. *See infra* at III. The Court's determination that no cause of action under the Wrongful Death Act existed was based

not only on its perception that a fetus was not intended to be included as a "person" under the statute, but also that, to modify the statute to include a fetus in the term "person," was "unnecessary in light of the concomitant common-law right we determine to exist" in a parent to recover for emotional distress arising out of the death of an unborn fetus. *Giardina, supra,* 111 *N.J.* at 428, 545 *A.*2d 139. Plaintiff's constitutional challenge to the Wrongful Death Act is therefore rejected.

III

EMOTIONAL DISTRESS CLAIM

Plaintiff's emotional distress claim is founded on the proposition that defendant "terminated the life" of plaintiff's "child" under circumstances where he denied plaintiff the ability to make an informed decision whether or not to consent to the procedure. She argues that defendant failed to tell her a material fact; "that a reasonable and prudent patient in [plaintiff's] circumstance would want to know whether the proposed procedure would terminate the life of an existing human being." The trial court concluded that there were fact issues concerning the informed consent issue, but, as noted, dismissed the claim on the ground that the fetus was not a "constitutional person."

A physician's duty of disclosure in the typical malpractice case is measured by the "prudent patient" or "materiality of risk" standard. *Largey v. Rothman,* 110 *N.J.* 204, 212-13, 540 *A.*2d 504 (1988); *Blazoski v. Cook,* 346 *N.J.Super.* 256, 267, 787 *A.*2d 910 (App.Div.), *certif. denied,* 172 *N.J.* 181,

796 *A.*2d 897 (2002). The standard relates to the patient's needs, not the physician's judgment. *Niemiera v. Schneider,* 114 *N.J.* 550, 565 n. 4, 555 *A.*2d 1112 (1989). "[A] physician must disclose to a patient all material information that a 'prudent patient' might find significant for a determination whether to undergo the proposed [medical procedure]." *Id.* at 562, 555 *A.*2d 1112. This standard is objective. *Largey, supra,* 110 *N.J.* at 211, 540 *A.*2d 504. "The test for determining whether a particular risk must be disclosed is its materiality to the patient's decision, *i.e.*, all risks potentially affecting the decision must be divulged." *Blazoski, supra,* 346 *N.J.Super.* at 268, 787 *A.*2d 910 (citing *Largey, supra,* 110 *N.J.* at 211-12, 540 *A.*2d 504). Aside from establishing that the physician failed to comply with this applicable standard of disclosure, a plaintiff must also establish proximate cause. *Largey, supra,* 110 *N.J.* at 215, 540 *A.*2d 504; *see also Howard v. University of Med. & Dentistry of N.J.,* 172 *N.J.* 537, 559, 800 *A.*2d 73 (2002) (a plaintiff must "show a causal connection between the inadequately disclosed risk of the procedure and the injury sustained"). Plaintiff must demonstrate that a prudent person under her circumstances would not have consented and submitted to the medical procedure had she been properly informed. *Teilhaber v. Greene,* 320 *N.J.Super.* 453, 465, 727 *A.*2d 518 (App.Div.1999). Thus, the issue of causation is also governed by an objective standard. *Largey,* 110 *N.J.* at 215-16, 540 *A.*2d 504.

Applying these principles in the context of a termination of pregnancy context raises difficult questions because moral, philosophical or religious beliefs may be implicated in a woman's choice. Therefore, during oral argument before us,

both parties have agreed that it is premature to define what duty of care is owed by a physician in this context. The parties also rightly agree that we should not, at this posture of the case, address the fact-sensitive issues concerning what dangers incident to, or consequences resulting from, such a procedure would be "material" to the "prudent patient." Both parties concur that resolution of these issues should await a complete factual record. Therefore, we do not address these perplexing issues. Consequently, solely for the purpose of addressing the narrow issue before us, we will assume that defendant owed a duty to plaintiff to disclose all material information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy. We also assume that defendant breached that duty, and the breach was a proximate cause of plaintiff's choice to undergo the procedure.

We conclude that the trial court erred in dismissing her emotional distress claim on the basis that a fetus is not a "constitutional person." *Roe* indeed held that the word "person" as used in the Fourteenth Amendment does not include the "unborn." *Roe, supra,* 410 *U.S.* at 158, 93 *S.Ct.* at 729, 35 *L.Ed.*2d at 180. However, *Roe* involved a woman's privacy right, derived from the Due Process Clause of the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action. . . ." 410 *U.S.* at 153, 93 *S.Ct.* at 727, 35 *L.Ed.*2d at 177. The issue in *Roe* was whether that privacy right is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Ibid.* The Court held that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in

regulation." 410 *U.S.* at 154, 93 *S.Ct.* at 727, 35 *L.Ed.*2d at 177-78.

Roe is not dispositive here because this is not a case implicating a government's attempt to limit a woman's privacy right to terminate a pregnancy. Crediting plaintiff's proofs, it is about a woman who claims severe emotional distress caused by medical advice resulting in her grudging *consent* to terminate a pregnancy, purportedly given because of defendant's failure to advise her of the material consequences of the procedure. The fact that a fetus may not be a "person" under the Fourteenth Amendment is irrelevant because plaintiff's claim is not dependent upon whether or not the fetus enjoys a constitutional status as a "person." The claimed malpractice committed by defendant was directed against plaintiff as an expectant mother and thus was a direct, not a derivative claim. *See Giardina, supra,* 111 *N.J.* at 413, 545 *A.*2d 139 ("the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury . . .").

In our view, plaintiff's emotional distress claim is well-founded under New Jersey law. The claim of emotional distress in this context has evolved by recognition of the intimate familial relationship between the claimant and the immediate victim, *Giardina, supra,* 111 *N.J.* at 417, 545 *A.*2d 139, and "the foreseeability of parental suffering. . . ." *Ibid.*

For example, in *Portee, supra,* the Court recognized a common-law cause of action for negligent infliction of emotional distress in a "bystander" case, where plaintiff established the following elements: "(1) the death or serious

physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." 84 *N.J.* at 101, 417 *A.*2d 521. In the so-called wrongful birth cases, the Court held in *Berman v. Allan,* 80 *N.J.* 421, 439, 404 *A.*2d 8 (1979), that a defendant's failure to advise a pregnant woman of the availability of amniocentesis permits recovery by the parents for their mental and emotional injury on account of their child being born with congenital defects. Similarly, in *Schroeder v. Perkel,* 87 *N.J.* 53, 63-64, 432 *A.*2d 834 (1981), the Court held that an emotional distress claim of parents was cognizable for defendant's negligent genetic counseling, which deprived the parents of the opportunity of considering the wisdom of having another child.

In *Giardina, supra,* 111 *N.J.* at 420, 545 *A.*2d 139, the Court extended the emotional distress cause of action to parents of a stillborn infant. It concluded that "the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury, their emotional distress and mental suffering, for which they are entitled to recover compensatory damages." *Id.* at 413, 545 *A.*2d 139. It explained, "[b]y recognizing such a cause of action we protect the interests affected by the tortious conduct resulting in the death of an infant before birth." *Ibid.* The Court added:

> Medical malpractice causing a stillbirth results in infliction of a direct injury to the mother as well as to her unborn child. Even without any

> permanent physical harm, the mother suffers severe and genuine injuries in the form of emotional distress and mental anguish occasioned by her baby's stillbirth. This suffering is experienced, also, by the father of the infant. Thus, in a case such as this, the injury suffered by the mother and father on the stillbirth of their eagerly expected first child is palpable and predictable.

[*Id.* at 415, 545 *A.*2d 139.]

We are satisfied that the *Giardina* cause of action should be available to plaintiff. It is, of course, true that in this case, unlike *Giardina,* there was no "birth" at all. Thus, defendant argues, *Giardina's* cause of action in the present context is not available because there was no expectation of birth of a healthy child and no birth process at all. Defendant reasons that without these facts, the claim for negligent infliction of emotional distress is constitutionally precluded because it is not a direct claim by plaintiff, but like a wrongful death claim, wholly derivative. We reject the argument. First, as stated, the cause of action for emotional distress set forth in *Giardina* is not derivative, but direct. *See* 111 *N.J.* at 413, 545 *A.*2d 139.

Second, the thrust of plaintiff's claim is that there was no expectation of birth of a healthy child and no birth process because of defendant's tortious conduct. In other words, she was deprived of these intimate experiences because she was not informed of the material consequences of the procedure. In *Giardina,* it was negligent treatment. Here, it is the failure on the part of a physician to impart information about the

status of the fetus and other information that may have been material to plaintiff in making her choice. There is no logical basis to distinguish the cases simply because the tortious conduct of the defendants differed, or that the fetus in this case did not survive full term.

Defendant further argues that the "death" of a fetus as a result of a termination of pregnancy should not be treated as akin to a stillbirth because, unlike a stillbirth, it is the desired outcome. This argument, of course, begs the question. Whether the termination was the "desired outcome" is a fact-based issue. Defendant's argument wrongly presumes the failure of plaintiff's proffered proof that her consent to the termination of pregnancy was not informed.

We deem plaintiff's emotional distress cause of action as a logical complement to the "wrongful birth" cases, which involve a "violation of the interest in self-determination," and which focus on "the parents' lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects." *Canesi v. Wilson,* 158 *N.J.* 490, 501-02, 730 *A.*2d 805 (1999) (citing *Schroeder, supra,* 87 *N.J.* at 66, 432 *A.*2d 834; *Berman, supra,* 80 *N.J.* 421, 404 *A.*2d 8, and *Procanik v. Cillo,* 97 *N.J.* 339, 478 *A.*2d 755 (1984)). "[A] woman's right to determine for herself whether or not to continue or terminate her pregnancy . . . protects a distinctively personal interest." *Canesi, supra,* 158 *N.J.* at 501, 730 *A.*2d 805. The "distinctively personal interest" to choose not to give birth to a baby has a logical corollary; a distinctively personal interest, based on a woman's circumstances and discrete moral and religious beliefs, to choose *not* to terminate the pregnancy after being

informed by her physician regarding the status of the fetus and all other facts that may be deemed material in making that choice. The wrongful birth of a baby with a congenital defect may obviously give rise to profound mental anguish. Based on the circumstances, background and beliefs of a mother, inducing her to terminate the pregnancy, even at eight weeks, because of the physician's failure to obtain an informed consent may also result in severe distress and mental anguish. *See Willis v. Ashby,* 353 *N.J.Super.* 104, 112, 801 *A.*2d 442 (App.Div.2002) (quoting James R. Woods, Jr., M.D. and Jenifer L. Esposito Woods, M.B.A., *Loss During Pregnancy or in the New Born Period: Principles of Care with Clinical Cases and Analyses* 5 (Jannetti 1997)) (" '[t]he vast majority of people respond to pregnancy loss, *regardless of gestational age,* as the death of a baby and the subsequent death of their hopes and dreams' "; emphasis added). Plaintiff, of course, is left to her proofs on this point. We reverse dismissal of plaintiff's emotional distress claim and remand for further proceedings.

Affirmed in part; reversed in part and remanded for further proceedings.

APPENDIX C — ORDER OF JUDGE HAUGE FOR PARTIAL SUMMARY JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY FILED JUNE 6, 2001

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. MID-L-3812-98

CIVIL ACTION

ROSA ACUNA Administratrix ad Prosequendum of the Estate of MICHAEL DOE (fictitious name of real individual), deceased infant of ROSA ACUNA, General Administratrix of the Estate of MICHAEL DOE, (fictitious name of a real individual), deceased infant of ROSA ACUNA, and ROSA ACUNA, individually,

Plaintiff(s),

v.

SHELDON C. TURKISH, M.D., OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY – EDISON, a Partnership or P.C. organized under the State of New Jersey, JANET JONES, R.N. (a fictitious name of a real individual),

Defendant(s).

Appendix C

ORDER FOR PARTIAL SUMMARY JUDGMENT AS TO THE FIRST, SECOND, THIRD, FOURTH AND FIFTH COUNTS OF THE AMENDED COMPLAINT

This matter having been opened to the Court by Kalison, McBride Jackson & Murphy, attorneys for defendants, Sheldon C. Turkish, M.D., and Obstetrical and Gynecological Group of PerthAmboy-Edison, on a motion for Partial Summary Judgment and the Court having considered the papers submitted, and any arguments of counsel, and for good and sufficient cause shown;

IT IS ON this 6th day of June, 2001

ORDERED that Summary Judgment be and hereby is entered in favor of the defendants pursuant to N.J.S.A. 2A:62A-1 as to the First, Second, Third, Fourth and Fifth Counts of the Second Amended Complaint; and it is

FURTHER ORDERED that all causes of action as to plaintiff "Michael Doe" in the Second Amended Complaint be and hereby are dismissed.

s/ Doug Hague
Doug Hague J.S.C.

APPENDIX D — LETTER OPINION OF THE SUPERIOR COURT OF NEW JERSEY DATED MAY 1, 2001 SIGNED BY THE HONORABLE DOUGLAS T. HAUGE, J.S.C.

SUPERIOR COURT OF NEW JERSEY

May 1, 2001

Cassidy Messina & Laffey
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Holmdel, NJ 07733-2103
Attn: Harold Cassidy, Esq.

Kalison McBride Jackson & Murphy, P.A.
Liberty Corner Executive Center
645 Martinsville Road
PO Box 814
Liberty Corner, NJ 07938
Attn: John Zen Jackson, Esq.

LETTER OPINION

Re: Acuna v. Turkish
MID-L-3812-98

Dear Counsel:

Defendant, Sheldon Turkish, M.D., filed a motion for partial summary judgment returnable on March 30, 2001. On March 22, 2001, this Court heard oral argument and reserved judgment. Today, this Court grants Defendant's motion for partial summary judgment.

Appendix D

This action arises from an abortion procedure performed by Defendant at his office on Plaintiff on April 9, 1996. It is undisputed that on April 6, 1996, Plaintiff underwent an ultrasound which revealed that she was pregnant. After having read and signed a consent form, Plaintiff decided to have an abortion. Defendant then performed the procedure on April 9, 1996.

On May 5, 1996, Plaintiff developed bleeding and sought medical care at the Robert Wood Johnson University Hospital. Plaintiff underwent a dilatation and curettage. A pathology report states that the procedure yielded no fetal parts, only chorionic villi and decidua.

While in the ER, a nurse allegedly made a statement to Plaintiff that part of her baby had been left in her. Plaintiff further claims that Dr. Turkish told her prior to the abortion that there was no baby; consequently, Plaintiff had difficulty reconciling the two statements. Plaintiff then began researching the subject and claims that after concluding her research, she discovered that she really was pregnant with a baby, not simply a mass of tissue or blood.

This issue for purposes of this motion is whether a six to eight week fetus is considered a person under the laws of this state for purposes of maintaining causes of action for wrongful death, survival, and negligent infliction of emotional distress. The Supreme Court of the United States has consistently adhered to the holding of *Roe v. Wade*, 410 U.S. 113 (1973), that the unborn are not persons under the 14th Amendment. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992); *see also*

Appendix D

Roe v. Wade. In *Alexander v. Whitman*, 114 F.3d 1392 (1997), the Third Circuit Court of Appeals stated that "the issue is not whether the unborn are human beings, but whether they are constitutional persons." *Id.* at 1402.

In the case at bar, Plaintiff introduces extensive medical evidence to prove that a fetus is a human being. However, that is not the issue. The issue is whether a six to eight week fetus is a constitutional person; and the answer is no. So, although this Court sympathizes with Plaintiff's argument and effort, this Court must adhere to the fact that the highest Court of this country has held that a fetus is not a human being under our constitution. As such, the claims for wrongful death, survival, and negligent infliction of emotional distress cannot survive and must be dismissed because no constitutional persons existed to maintain these causes of action.

Under this state's Wrongful Death Statute, the Court in *Giardina v. Bennett*, 111 N.J. 412 (1988), held that in enacting the Wrongful Death Statute, "the Legislature . . . never intended to create a derivative action in favor of the survivors of a fetus never born alive and that in the contemporary setting the legislative purpose will not be frustrated by adherence to this original and continuing understanding." *Id.* at 428. For a survival claim, the Court in *Alexander* held that "it is clear by the implications of the holding in *Giardina* and by the language of the survival action statute itself that the New Jersey Legislature did not intend to provide the parents of unborn or stillborn fetuses with a statutory cause of action for survival." *Alexander*, 114 F.3d at 1399. As such, *Giardina* and *Alexander* are consistent with the holding in

Roe. Therefore, Plaintiff cannot sustain causes of action for wrongful death or survival.

Finally, a cause of action for "negligent infliction of emotional distress requires proof of the following elements: (1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." *Portee v. Jaffee*, 84 N.J. 88, 101 (1980). Here, there is no injury to another because a fetus is not a constitutional person. Subsequently, the cause of action for negligent infliction of emotional distress also fails and must be dismissed.

Therefore, it is the ruling of this Court that the Defendant's motion for partial summary judgment is GRANTED. If the Plaintiff decides to file an interlocutory appeal, then this matter shall be stayed for 60 pending resolution of that appeal. The Defendant shall submit an order in accordance with this ruling.

Very truly yours,

s/ Doug Hague
Doug Hague, J.S.C.

APPENDIX E — ORDER OF THE NEW JERSEY SUPREME COURT DISMISSING APPEAL DATED JANUARY 18, 2007

SUPREME COURT OF NEW JERSEY
A-59 September Term 2006
59,643

ROSA ACUNA, etc., et al.,

Plaintiffs-Appellants,

v.

SHELDON C. TURKISH, M.D., et al.,

Defendants-Respondents.

ORDER

This matter having come before the Court on a claimed appeal as of right pursuant to *Rule* 2:2-1 (a) (1), and the Court having determined that the matter does not present a substantial constitutional question within the meaning of the *Rule* or applicable caselaw;

It is ORDERED that the within appeal is dismissed.

WITNESS, the Honorable James R. Zazzali, Chief Justice, at Trenton, this 18th day of January, 2007.

s/ [illegible]
CLERK OF THE SUPREME COURT

APPENDIX F — STATUTES INVOLVED

TITLE 2A. ADMINISTRATION OF
CIVIL CRIMINAL JUSTICE
SUBTITLE 6. CIVIL ACTIONS
CHAPTER 31. ACTIONS BY WRONGFUL DEATH

§ 2A:31-1. When action lies

> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

§ 2A:31-2. Persons entitled to sue or make claim

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the cause may be, shall bring the action.

Appendix F

§ 2A:31-3. Limitation of actions; exceptions

Every action brought under this chapter shall be commenced within 2 years after the death of the decedent, and not thereafter, provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time.

§ 2A:31-4. Persons entitled to amount recovered

The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same. If any of the persons so entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among them, taking into account in such determination, but not limited necessarily thereby, the age of the dependents, their physical and mental condition, the necessity or desirability of providing them with educational facilities, their financial condition and the availability to them of other means of support, present and future, and any other relevant factors which will contribute to a fair and equitable apportionment of the amount recovered.

Appendix F

§ 2A:31-5. Assessment of damages by jury

In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funer expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent.

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(2)

No. 06-1689

FILED
AUG 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ROSA ACUNA, Administratrix ad Prosequendum of the Estate of ANDRES ACUNA, deceased,

Petitioner,

v.

SHELDON C. TURKISH, M.D., and OBSTETRICAL and GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Superior Court of New Jersey, Appellate Division, correctly affirmed the dismissal of Petitioner's claim that the New Jersey Wrongful Death Statute, *N.J. Stat. Ann.* § 2A:31-1 to -6 (2008), violates the Fourteenth Amendment's Equal Protection Clause because it does not include a cause of action for the wrongful death of a non-viable fetus.

PARTIES TO THE PROCEEDING

Petitioner, Rosa Acuna, is an individual and a resident of the State of New Jersey.

Respondent Sheldon C. Turkish is a individual licensed to practice medicine in the State of New Jersey. Respondent Obstetrical and Gynecological Group of Perth Amboy-Edison, P.C. is a professional corporation of the State of New Jersey.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Obstetrical and Gynecological Group of Perth Amboy-Edison does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Rosa Acuna ("Petitioner" or "Acuna") is a woman who grew up in the New Jersey and New York City area and who, at the time of her deposition, had two children. She attended high school for four years, but did not graduate. (Pa555-56, 575, 634.)

On December 31, 1991, Acuna became a patient of Respondent Dr. Turkish's medical practice. (Pa579.) At that time, she was using oral contraceptives to avoid pregnancy. (Pa558-Pa559.)

On January 7, 1993, Acuna was seen by Dr. Armine Vafai, the other physician in the practice, because of bleeding in connection with a pregnancy. (Pa564-Pa565). The next day, Dr. Vafai performed a dilation and curettage (D&C) procedure on her because of an incomplete abortion, also known as a miscarriage. (Pa565.)

On October 21, 1993, Petitioner gave birth to her first child. (Pa575.) Her second child was born on June 21, 1995. (Pa 634.)

At the latest, by the time of her first pregnancy in 1993, Acuna knew that being pregnant meant that, barring a miscarriage or an abortion, eventually she was going to have a baby and, in the course of being pregnant, a fetus was forming in her uterus. (Pa566 – Pa 568.)

On April 6, 1996, Acuna went to Dr. Turkish's office. She reported a last menstrual period (LMP) of February 21, 1996. (Pa612.) During this visit, Dr. Turkish performed a physical examination which revealed a pregnancy estimated

at seven or eight weeks of gestation post-LMP, (*i.e.*, from the first day of Petitioner's last menstrual period said to be February 21). (Pa611-Pa612.) An ultrasound confirmed the pregnancy and indicated it was seven weeks from LMP. (Pa607.) Calculations of pregnancy in terms of LMP are two weeks longer than calculations of the pregnancy from the time of conception. (Pa648-Pa649.) Thus, as of April 6, 1996, the pregnancy was seven weeks LMP and five weeks post-conception. *Ibid.*

At the April 6 office visit, Dr. Turkish spoke with Petitioner regarding her condition and treatment, including a discussion of a procedure for the termination of the pregnancy. (Pa603.) Dr. Turkish told Acuna to go home and think about whether she wanted to terminate the pregnancy. (Pa604.)

Three days later, on April 9, 1996, Acuna came back to Dr. Turkish's office for the procedure to terminate her pregnancy. (Pa589.) At that time, she signed a document giving her consent to the termination of her pregnancy. (Pa590-Pa591; Pa594.) At the time of the procedure, Rosa Acuna was 29 years old. (Pa 552.)

Petitioner filed a multi-count complaint against Respondents alleging wrongful death (counts one and two), survivor claims (counts three and four), emotional distress (count five), medical malpractice / negligence (count six) and personal injury (count eleven). Other parts of the complaint (counts seven through ten) directed at a fictitiously-designated nurse have been abandoned. *Acuna v. Turkish*, 808 A.2d 149, 151 (N.J. Super. Ct. App. Div. 2002) ("*Acuna I*").

On May 1, 2001, the Honorable Douglas T. Hauge, J.S.C. granted Respondents' motion for partial summary judgment and dismissed counts one through five asserting claims for wrongful death, survivor claims and emotional distress.

Following leave granted, the Superior Court of New Jersey, Appellate Division ("Appellate Division") affirmed the dismissal of counts one and two, the wrongful death claims, but reversed and remanded on count five, the emotional distress claim, holding that if Petitioner established her claim for medical malpractice, this would constitute a direct tort against Petitioner which would entitle her to emotional distress-based damages. *Acuna I*, at 151.

Petitioner did not appeal the dismissal of the survivor claims (counts three and four), *ibid*, and later abandoned them.[1] *See Acuna v. Turkish*, 894 A.2d 1208, 1211 n.2 (N.J. Super. Ct. App. Div. 2006) ("*Acuna II*").

Following remand and extensive discovery, Respondents moved for summary judgment on the remaining claims of emotional distress (count five) and negligence (counts six and eleven).

---

[1] By separate statute, *N.J. Stat. Ann.* § 2A:15-3, tort claims for an injury during one's lifetime survive and are preserved to the decedent's estate. The executor or administrator may pursue any cause of action that the decedent would have had if the decedent had lived. This statute is interchangeability referred to in the case law as the "Survivorship Act" and the "Survival Act." *Compare Smith v. Whittaker*, 734 A.2d 243, 249 (N.J. 1998) *with Canino v. New York News, Inc.*, 475 A.2d 528, 530 n.1 (N.J. 1984). Herein, these claims will be referred to as Petitioner's "survivor claims." To the extent which the Petition raises claims based on dismissal of the survivor claims, they have not been raised below before any appellate tribunal, and therefore are not properly before this Court.

On March 3, 2004, the Honorable Amy Piro Chambers, J.S.C., dismissed Petitioner's remaining claims alleging negligence, medical malpractice and emotional distress. *Acuna II*, 894 A.2d at 1212. On appeal, the Appellate Division reversed and remanded, "for reasons entirely different from those advanced in Acuna's brief." *Id.* at 1213. However, it declined to reconsider its prior decision affirming dismissal of Petitioner's wrongful death claims. *Id.* at 1215.

Prior to remand, however, the Supreme Court of New Jersey granted Respondents' Petition for Certification regarding the negligence and emotional distress issues addressed in *Acuna II*. 902 A.2d 1234 (N.J. 2006). This matter has been fully briefed and argued before the New Jersey Supreme Court.

In response to Respondents' request for review by the New Jersey Supreme Court, Petitioners filed an appeal asserting "a substantial constitutional question" arising out of the dismissal and denial of the wrongful death claims, entitling Petitioner to an appeal "as of right" under the applicable Rule of Court. However, the New Jersey Supreme Court dismissed Petitioner's appeal of the wrongful death arguments raised by this Petition as not presenting a substantial constitutional question. 915 A.2d 1045 (N.J. 2007).

REASONS FOR DENYING THE PETITION

This Petition should be rejected because it seeks review of a well-settled question of New Jersey law which does not conflict with any applicable federal decision, statute or constitutional provision.

The Appellate Division correctly held that the State Supreme Court's interpretation of the New Jersey Wrongful Death Act (hereafter "the Act") in *Giardina v. Bennett*, 545 A.2d 139, 142 (N.J. 1988) and *Graf v. Taggart*, 204 A.2d 140, 142 (N.J. 1964), as not allowing a cause of action for wrongful death prior to birth, did not violate the Fourteenth Amendment's Equal Protection Clause. *Acuna I*, 808 A.2d at 155-56. The New Jersey Wrongful Death Act is an appropriate exercise of a state's police power to define its own tort law.

Further weight against granting this Petition is found in the Third Circuit's repeated repudiation of Fourteenth Amendment challenges to the Act which are nearly identical to those advanced by Petitioner here. *Marie v. McGreevey*, 314 F.3d 136 (3d Cir. 2002), *cert. denied*, 539 U.S. 910 (2003); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997). There are no conflicting decisions in other Circuits.

Moreover, with both *Acuna I* and *Giardina*, the State of New Jersey is in accord with ten other jurisdictions which require live birth and thirty-one other jurisdictions which require at least fetal viability as a prerequisite to recovery in tort for wrongful death. *See Appendix A on Behalf of Respondents*, State Survey of Permitted Fetal Wrongful Death Actions ("Appendix A"). The position advanced by Petitioner that a wrongful death claim may be brought with regard to a non-viable embryo is followed only in a distinct minority of jurisdictions. *See Appendix A, infra*. The eight jurisdictions which permit such actions are Georgia, Illinois, Louisiana, Mississippi, Missouri, South Dakota, Texas and West Virginia. That determination was generally made by legislative action.

Additionally, in every case where a federal equal protection challenge has been brought, none of the statutes which require live birth as a condition to a wrongful death claim have been held to offend the Fourteenth Amendment. *Marie*, 314 *F.*3d at 141-42; *Justus v. Atchison*, 565 P.2d 122, 131 (Cal. 1977), *overruled on other grounds, Ochoa v. Superior Court,* 703 P.2d 1 (Cal. 1985); *Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980); *McVey v. Sargent,* 855 N.E.2d 324, 328-29 (Ind. Ct. App. 2006), *transfer denied,* 869 N.E.2d 447 (Ind. 2007); *Kandel v. White*, 663 A.2d 1264, 1269 (Md. 1995); *Fort Worth Osteopathic Hosp. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004) (later abrogated by statute);

Attempting to lure the Court's interest in this case, Petitioner incorrectly asserts that the alleged errors below are a result of "confusion" caused by *Roe v. Wade*, 410 U.S. 133 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). While Petitioner seeks to compel recognition of a five-week embryo within the scope of the New Jersey statutory term "person," the holding of *Roe* and reiterated in *Casey* could not be clearer: neither an embryo nor a fetus is a "person" for the purposes of the Fourteenth Amendment. Thus, Petitioner's attack on *Giardina's* interpretation of the Act is mere guise to overturn this aspect of *Roe*.

Furthermore, the acceptance of Petitioner's position that the Equal Protection Clause requires recognition of a wrongful death cause of action for a non-viable fetus will invalidate the statutory framework in place in most states in the country and result in the expansion of tort liability. Of the thirty-one jurisdictions which recognize a wrongful death action when the predicate of viability (in contrast to live birth) is met, at least twenty-one have explicitly rejected the attempt to extend the cause of action to a non-viable fetus.

Accordingly, none of the compelling reasons indicated in Rule 10 of the Supreme Court Rules are present. Accordingly, as discussed below, the petition should be denied.

POINT I: The Appellate Division Correctly Held, In Accord With Other State and Federal Courts, that the "Born Alive" Requirement of New Jersey's Wrongful Death Act Does Not Violate Fourteenth Amendment Equal Protection Guarantees.

The ability to sue for the "wrongful death" of another did not exist at common law. Rather, it appeared as a legislatively-recognized exception to the traditional rule barring such recovery. As recognized below, it is neither a Constitutional nor "fundamental" right subject to enhanced scrutiny. *Acuna I*, 808 A.2d at 155. Owing to its statutory origins in each state, the elements of this action, like other torts, varies from state to state without implicating Equal Protection concerns. There are varying standing requirements, differing limitations periods, disparities in the scope of recovery, and other distinctions in the elements of these tort actions depending on state law.

In New Jersey, an action for wrongful death is intended to compensate survivors for the pecuniary losses they suffer because of the tortious conduct of others. *Giardina*, 545 A.2d at 145. In relevant part, the statute, which enables this recovery, provides:

> [w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person

> injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury had death not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime. [*N.J. Stat. Ann.* § 2A:31-1.]

The scope of recoverable damages is set forth in a separate provision, limiting them to "pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased." *Id.* at § 2A:31-5.

This tort action did not exist at common law. Instead, it was created, and continues to be regarded, as a "creature of statute" patterned on Lord Campbell's Act, 9 & 10 Vict. c. 93, An Act for compensating the Families of Persons killed by Accidents (Aug. 26, 1846). *Giardina*, 545 A.2d at 144-45 (citation omitted).

As this Court has noted, the statutory origin of a wrongful death claim has "important consequences," foremost among them that "[s]ince the right was unknown at common law, the legislatures which created the right were free to impose restrictions upon it." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 579 (1974) (internal quotation omitted), *impliedly overruled on other grounds*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

As a result, wrongful death jurisprudence is unique to each state. For example, some states hold that an action for wrongful death is barred if the decedent already recovered

for the same injuries during their lifetime, while others permit recovery in such cases. *Id.* at 579. In addition, while recovery for "loss of support" in a wrongful death case has been "universally recognized," compensation for lost services and "loss of society" has produced variation among the states. *Id.* at 584-85.

The differences among the states regarding the definition of, and remedies for, wrongful death is not surprising; the regulation of health and safety, and the provision of tort remedies to compensate for personal injuries is an area in which states have historically exercised general police powers. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 894 (2000); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (noting "the States' traditional authority to provide tort remedies to their citizens"); W. Prosser, *Handbook of the Law of Torts*, § 5 at 23 (4th ed. 1971) (remarking that state tort law unquestionably relates to matters of health and safety). Moreover, federalism considerations grant State action of this kind, including New Jersey's definition of "person" in the context of the Act, deferential treatment. *Geier*, 529 U.S. at 894

In this regard, the federal government's deference to state law has led to a variety of approaches which, while different, are not mutually exclusive.[2] *BMW of North America, Inc. v.*

[2] Indeed, under our federalist system, divergent and experimental approaches are encouraged and intended. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (finding "one of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (internal quotation omitted)).

Gore, 517 U.S. 559 (1996) (stating "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case").

In New Jersey, the tort of wrongful death is considered separate and "derivative" from other negligence-based theories of recovery. *Giardina*, 545 A.2d at 145. Petitioner's reference to concepts based in medical malpractice, informed consent and other negligence-related doctrines is therefore misleading and of no consequence in the context of this Petition. *See, e.g.*, (Pet. Br. at 13 – 17.)

Giardina's essential holding, that the Act "does not permit recovery attributable to the wrongful death of an infant before birth," was reached after a searching review of the Act's language, legislative history, historical interpretation, analogous statutory schemes and consideration of a common-law remedy in the form of an emotional distress claim which satisfactorily accommodates the parental interest implicated in appropriate situations. *Giardina*, 545 A.2d at 146. For example, the court noted that the legislature knows how to encompass fetuses and embryos in statutory language, but explicitly did not choose to do so in the Act. *Id.* at 145-46. The court also looked to previous cases in which courts allowed children to recover for prenatal injuries after birth, and noted in those cases the right to recover "attaches, not to the embryo or fetus, but to the living child." *Id.* at 145 (internal quotation marks and citation omitted). The court perceived a legislative intent that a fetus was not intended to be included in the statute as "a being whose death can give rise to a claim for pecuniary injury" and that "the Legislature in enacting the original Act, and in subsequent revisions, never intended to create a derivative action in favor of the survivors of a fetus never born alive." *Id.* at 147.

Only after this comprehensive review, did the New Jersey Supreme Court find "no compelling underlying policy that would impel us to give the statutory term 'person' an expansive interpretation here." *Id.* at 146. Petitioner is thus incorrect when she claims that *Giardina* construed the Act to exclude recovery for fetal wrongful death "based *exclusively* on the premise that the 19th century legislature could not have intended to include [them] . . . because it operated under a false assumption of fact that the unborn child was merely part of his or her mother." (Pet. Br. at 19 (emphasis added).) The court specifically referred to the "contemporary setting" which included ever-enhancing improvements in medical care and understanding of fetal development. *Id.* at 146-47.

In the nineteen years since *Giardina*, the New Jersey Legislature has not acted to override, correct or modify the New Jersey Supreme Court's judgment which anchors the Act's definition of "person" to the original legislative intent of creating a narrow exception to the traditional common law bar which completely prohibited tort recovery for wrongful death.[3] *Id.* at 145.

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[3] It is also significant to note, as Judge (now Justice) Alito did in a similar case discussed *infra*, that "at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for an injury to a stillborn child was not recognized." *Alexander*, 114 F.3d at 1409 (Alito, J., concurring). *Accord, Casey*, 505 *U.S.* at 913 (Stevens, J., concurring in part and dissenting in part); *Roe*, 410 U.S. at 157 (stating that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). Thus, *Giardina's* holding that an embryo or fetus is not a "person" under the Act, is consistent with the original intent of the Act, which was to create a limited exception to the common law rule barring recovery for wrongful death, is also consistent with the Fourteenth Amendment.

Petitioner nonetheless contends that the Act violates the Equal Protection Clause and is subject to strict scrutiny because it impacts an alleged fundamental right in her "relationship" with her embryo. (Pet. Br. at 21-22.) Despite Petitioner's characterizations, the Appellate Division correctly held that heightened scrutiny is inappropriate and the Act easily survives rational basis review. Similarly, in dismissing Petitioner's claimed appeal "as of right," the New Jersey Supreme Court appropriately concluded that it did not present "a substantial constitutional question."

For purposes of substantive due process, state actions which implicate anything less than a fundamental right require only that the government demonstrate a reasonable relation to a legitimate state interest to justify the action. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Such laws are generally presumed to be valid and will be sustained if the classification is rationally related to a legitimate state interest. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955 (9th Cir. 2005).

Rational basis review is appropriate here because there is no fundamental liberty interest embedded in the ability to sue for wrongful death. "Fundamental interests" are not simply general interests of "particular human or societal significance"; rather, they are those which "have their source, explicitly or implicitly, in the Constitution." *Alexander*, 114 F.3d at 1409 (quotation omitted). Because the right to bring a wrongful death action was not part of the common law, and exists purely by operation of statute, "[i]t cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is a 'fundamental' or constitutional right."

Parham v. Hughes, 441 U.S. 347, 358 n.12 (1979).[4] The Appellate Division therefore correctly held that rational basis review is appropriately applied to Petitioner's claim, as was the case in *Alexander* and *Marie*. Furthermore, the New Jersey Supreme Court appropriately dismissed the appeal "as not presenting a substantial constitutional question."

The Third Circuit recently considered two Equal Protection challenges that were virtually identical to Petitioner's. In both instances, the court applied rational basis review, soundly repudiating plaintiff's arguments (repeated by Petitioner here), and review was denied by this Court. *See Alexander,* 114 F.3d at 1408, *cert. denied*, 522 U.S. 949 (1997); *Marie*, 314 F.3d 136, *cert. denied*, 539 U.S. 910 (2003). *See also Fields*, 413 F.3d 955-56 (rational basis test applied to Oregon statute of limitations and repose despite alleged discrimination against claimants based on date of death and discovery of injury causing death).

In *Alexander*, plaintiff was admitted to a hospital for delivery of an apparently health baby. However, due to unforeseen cardiovascular collapse, the delivery was stillborn. 114 F.3d at 1396. She filed a lawsuit seeking wrongful death and survivor damages; however, the surrogate refused to issue the required letters of administration. This

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[4] Contrary to Petitioner's contention, nowhere does *Alexander* hold "that the question of whether an unborn child is a human being is a question of scientific fact for a jury." (Pet. Br. at 12.) In truth, *Alexander* finds that for purposes of determining whether it is a "person" under the Fourteenth Amendment, "it is immaterial that the complaint pleads that a stillborn child is a human being from conception". 114 F.3d at 1401. Accordingly, there is no apparent or actual conflict among the Circuits on this basis, as is suggested by Petitioner. (Pet. Br. at 12-13.)

prompted the plaintiff to file a class action in the District Court seeking a declaratory judgment that the Act was unconstitutional on Equal Protection grounds because it treated stillbirths different from live births by permitting a cause of action for the latter and prohibiting a cause of action for the former. *Id.* at 1396-97.

The Third Circuit affirmed the district court's dismissal, holding that the plaintiff "can only establish a claim on behalf of her child under the Fourteenth Amendment if the children fall within the protections afforded 'person[s]' as that term is used." *Ibid.* As has been conclusively established by this Court, they do not. *Roe*, *supra,* 410 U.S. at 157; *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part). The Third Circuit further observed that "[t]he issue is not whether the unborn are human beings, but whether the unborn are *constitutional persons*," *id.* at 1402 (emphasis added).[5]

As for the plaintiff's claim in *Alexander* that the Act violated her due process rights and right to equal protection, the court held that rational basis was the appropriate level of scrutiny as no fundamental right was implicated. The court rejected the argument that the Act infringed on the plaintiff's interest in her "relationship with her unborn child." The court

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[5] Petitioner's arguments regarding the "second patient" to whom a physician owes a duty of care when seeing a pregnant woman, (Pet. Br. at 13), fail to address the proper inquiry regarding Fourteenth Amendment "personhood." Indeed, these arguments in this respect are clearly erroneous, because if she were correct, then any termination of a pregnancy would be, by definition, wrongful, tortious, and criminal. Common sense dictates that a duty of care with regard to this "second patient" is only triggered by a woman's decision to continue her pregnancy uninterrupted.

held that this relationship "is exactly the same whether or not she can bring a wrongful death or survivor action." *Id.* at 1404. Rather than defining or influencing the relationship, the Act determines only whether or not Petitioner may seek pecuniary recovery for its loss. *Ibid.* The court therefore held that the Act should be reviewed under the rational basis test.

The *Alexander* court held that prohibiting a cause of action for an embryo or fetus that dies *in utero* is rationally related to the State's interest in defining its own tort law:

> [t]he requirement that the child on whose behalf a wrongful death and survival action is instituted have been born alive is rationally related to that interest. New Jersey has chosen to draw a bright line that eliminates the nearly impossible problems of proof inherent in such actions when injury to a fetus is at issue. Absent the limitation in these statutes it would be difficult, if not impossible, to prohibit a wrongful death or survival action no matter how early the fetus was in its development. This would mean that one could recover if it could be established that a zygote would have developed had not an alleged tortfeasor injured a developing fertilized egg seconds after the union of sperm and egg. [*Id.* at 1407.][6]

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[6] An attempt to bring a wrongful death claim for the loss of a three-day old frozen embryo that was to be implanted in the woman's body was rejected in *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. Ct. App. 2005).

The court went on to observe that a state could permit recovery for an injury to that which would later develop into a fetus but "it certainly was not required to do so under the Due Process or Equal Protection Clauses." It therefore concluded that "[l]imiting such actions in the manner that New Jersey has chosen is both reasonable and practical." *Id.*

In *Marie v. McGreevey,*[7] the Third Circuit also rejected the same argument advanced here in the specific context of abortion. There, the plaintiffs were women who had abortions allegedly without giving their informed consent and claimed that the Act's denial of their right to maintain a cause of action for the wrongful death of an embryo or fetus *in utero* violated their Equal Protection and Due Process rights under the Fourteenth Amendment. 314 F.3d at 139. The court rejected their claims for the same reasons discussed in *Alexander*.

Like the Third Circuit, the New Jersey Appellate Division recognized the frailty of Petitioner's argument advanced here: contrary to Petitioner's contentions, the Act does not attempt to classify women or give them special status based on whether or not they are pregnant; nor does the Act, on its face, focus on any special familial relationship or the sanctity of life. Indeed, the entire linchpin of Petitioner's argument — that a woman has a fundamental relationship with her embryo — was found to be "not dispositive" by the Appellate Division because the Act does not at all affect that relationship. *Acuna I*, 808 A.2d at 155.

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[7] Even though it is directly on point, there is no citation, discussion or analysis of *Marie v. McGreevy* in Petitioner's brief. This is astounding in light of Acuna originally having been an actual party in interest to that litigation in the District Court and represented by the same attorney in both matters.

Petitioners' central arguments closely parallel (if not exactly echo) those raised by the plaintiffs in *Marie*, and should be rejected for the same reasons. Like that case, Petitioner claims that *Giardina* violates her equal protection rights by creating a subclass of pregnant women, namely those who have elected to terminate their pregnancies, because such women are disallowed under the statutory scheme from asserting wrongful death claims. (Pet. Br. at 18.) Also, as in *Marie*, Petitioner alleges that she is subject to an arbitrary and capricious classification because she is unable to assert wrongful death claims on behalf of her terminated embryo in the same manner as women whose children suffered a pre-birth injury that causes death subsequent to their live birth. (Pet. Br. at 19.) These claims, the Third Circuit observed, are "precluded by" *Alexander*. *Id.* at 140-41.

Furthermore, although Petitioner is precluded from bringing a wrongful death claim under the Act, she is not without a cause of action; *Giardina* recognizes a "common law cause of action for emotional distress and mental anguish arising from the death of an infant before birth." *Acuna I*, 808 A.2d at 158 (citing *Giardina*, 545 A.2d at 139). The existence of this cause of action was also recognized by the Third Circuit in *Alexander*, 114 F.3d at 1405-06, and *Marie*, 314 F.3d at 140.[8] This is the manner in which New Jersey law accommodates alleged tortious injury to an embryo or fetus that dies *in utero*. This not an action for the death of a family member as contended by Petitioner. (Pet. Br. at 17.) Rather the claimed malpractice giving rise to the emotional

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[8] Acuna has, in fact, raised a claim for common law emotional distress in Count 5 of the Complaint. This issue remains with the New Jersey Supreme Court.

distress claim was "directed against plaintiff as an expectant mother and thus was a direct claim, not a derivative claim" from the fetal death. *Acuna I,* 808 A.2d at 157; *Acuna II,* 894 A.2d at 1211. Like the plaintiff in *Alexander*, the Petitioner's argument here boils down to a dissatisfaction with the cause of action that New Jersey tort law has provided. *Alexander*, 114 F.3d at 1405-06. But this dissatisfaction does not rise to the level of an equal protection violation. *Id.*

In a comment fairly summarizing the basic reason that this Petition should be rejected, the Third Circuit in *Marie* reiterated that "the New Jersey Wrongful Death Act does not affect the parent/child relationship in this case any more than it did in *Alexander*." *Id.* at 140-42. For this reason, and those expressed above, the Appellate Division correctly held that the classification drawn by *Giardina* survives rational basis review. *See e.g.*, *Acuna I,* 808 A.2d at 155 (stating that "the Act focuses on dependency and pecuniary loss. As such its classifications are rationally related to its purpose").

Accordingly, the Petition lacks merit and should therefore be denied.

POINT II: The Appellate Division's Holding Is Consistent with Other State Courts of Last Resort to Consider the Question.

Every other state court that has considered this issue has also rejected the Federal Equal Protection challenge to their wrongful death statutes that exclude recovery for stillbirths.[9]

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[9] Petitioner suggests that New Jersey's live birth prerequisite to wrongful death claims is a peculiar anomaly. This is wrong. (Cont'd)

The California Supreme Court considered this issue in *Justus v. Atchinson*, 565 P.2d 122, 131 (Cal. 1977) where court viewed the "principal issue" as whether a stillborn fetus was a "person" within the meaning of that state's wrongful death statute. After concluding that it was not, the California Supreme Court stated "[t]here is no merit in plaintiffs' alternative contention that [such a construction of the statute] denies them equal protection of the laws." *Id.* at 122. It further found that the legislature had acted rationally in not providing a cause of action for wrongful death in the case of a stillbirth. *Ibid.* Although the *Justus* court also denied recovery for emotional distress on the part of the parents, that part of the holding was subsequently overruled, bringing the decision in line with the approach taken in *Giardina*.

The Florida Supreme Court employed this interpretation of its wrongful death statute, rejecting a cause of action for the death of a stillborn fetus in *Hernandez v. Garwood*, 390 So.2d 357 (Fla. 1980), and concluded there was no constitutional defect. The plaintiff contended and the trial court concluded that the denial of such a cause of action was a violation of the Equal Protection guarantee. The Florida Supreme Court tersely rejected this analysis, finding that "[t]he statute in no way violates the equal protection clause of the United States Constitution, *see Roe v. Wade,* 410 U.S. 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (the word 'person' as

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(Cont'd)

Presently, eleven (11) states, including New Jersey, follow this "born alive" rule; twenty-nine or thirty states as well as the District of Columbia employ a viability standard, recognizing a cause of action for the death of only a viable fetus; and only eight (8) recognize a wrongful death claim for a fetal death prior to viability, either at fertilization (six states) or when the fetus becomes "quick" (two states). *See Appendix A.*

used in the fourteenth amendment does not include the unborn)." *Id.* at 359. This decision was followed in *Young v. St. Vincent's Medical Center,* 653 So.2d 499 (Fla. Dist. Ct. App. 1995), *aff'd*, 673 So.2d 482 (Fla. 1996).

Similarly, in *Kandel v. White*, 663 A.2d 1264 (Md. 1994), the Maryland Court of Appeals rejected the contention that drawing a line between viable and nonviable fetuses for wrongful death recovery was arbitrary; it concluded that excluding non-viable fetuses was not an equal protection violation. *Id.* at 1270.

The Texas Supreme Court also concluded that wrongful death statutes may properly distinguish between live birth and still births, and between viable and non-viable fetuses. In *Fort Worth Osteopathic Hosp. v. Reese,* 148 S.W.3d 94 (Tex. 2004), wrongful death and survivor claims were brought after a fetus died *in utero* during the seventh month of pregnancy. While the court noted that the fetus was viable, it nonetheless held that there was no cause of action under either the wrongful death or survivor statute, each of which required a live birth as a predicate for the claim.[10] In addition, it dealt with the constitutional question as "a matter of first impression," stating:

> Because we conclude that the Legislature's decision to exclude such claims is not

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[10] After the events giving rise to this case, the Texas legislature enacted a statute under which a cause of action for wrongful death may accrue at any time post-fertilization. *See Tex. Civ. Prac. & Rem. Code Ann.* § 71.001 (Vernon 2007). That statute specifically did not apply to claims arising out of medical care. Nonetheless, the analysis in *Reese* illustrates that the Fourteenth Amendment does not demand uniformity among the states in the regard.

> unconstitutional, we hold that the court of appeals erred in concluding that the Equal Protection Clause guarantees parents the right to bring a wrongful death or survival claim for a stillborn child. [*Id.* at 95.]

The Texas Supreme Court framed the equal protection argument as follows:

> Two classifications are at issue here. The first is the distinction in the wrongful death statute between parents of a stillborn fetus and parents of a child born alive. The second is the distinction under the survival statute between a fetus that dies *in utero* and a fetus that is born but dies subsequent to birth. The United States Supreme Court has held that the unborn are not included within the protection of the Fourteenth Amendment, which contains the Equal Protection Clause. . . . While the Supreme Court has acknowledged the state's interest in the life of a fetus before birth . . . it has never repudiated its holding in *Roe* that the Equal Protection Clause does not apply to a fetus. [*Id.* at 98 (citations omitted).]

Taking into consideration the derivative nature of the wrongful death claim, it held that there was no equal protection violation occasioned by prohibiting wrongful death or survivor claims after a stillbirth. The court stated that "[i]t is not a violation of the Equal Protection Clause to fail to provide parents with a claim for the wrongful death of a fetus *in utero* when the Equal Protection Clause does not

prohibit a legislative body from withholding a wrongful death cause of action from the fetus." *Ibid.* [11]

Most recently, in *McVey v. Sargent,* 855 N.E.2d 324 (Ind. Ct. App. 2006), *transfer denied,* 869 N.E.2d 447 (Ind. 2007), the court rejected a challenge that that state's Child Wrongful Death Statute violated equal protection guarantees in not permitting an action to be brought for the death of a viable fetus. It noted that the cause of action had not been recognized at common law and that the legislature intended to draw a line that would define and limit the cause of action only when the child had been "born alive." It found that the state has "an interest in determining that there is a specific point" at which parents may bring an action for a child's death. It concluded:

> The fact that the legislature set that point at the time of a live birth is rationally related to its legitimate interest in having such a time defined for its citizenry so that they might then pursue the action authorized by the statute. Therefore, we do not find the statute to violate equal protection. [855 N.E.2d at 329.]

The Indiana Supreme Court declined to review the matter.

This Court has recognized that the state has the ability to draw lines regarding the scope of tort liability and that the

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[11] Further, it explicitly overruled an earlier Court of Appeals holding that the wrongful death and survival statutes violated both federal and state constitutions. *Reese*, 148 S.W. 3d at 97 (overruling *Parvin v. Dean*, 7 S.W.3d 264 (Tex. App. 1999). *Parvin* did not proceed beyond the intermediate Court of Appeals.

primary tasking of the exercise of that power is to the legislature. Although not speaking in terms of an equal protection analysis, the New Hampshire Supreme Court eloquently addressed this issue in considering the availability of a wrongful death action for a ten to twelve week old fetus:

> The viable-nonviable distinction was made as part of the never-ending effort to widen more and more the circle of liability which surrounds us. As with all such efforts, the pressure never ends. When a new line is drawn, the pressure shifts to form a new and wider circle. Years ago, few if any would have foreseen that the circle would include a viable fetus. Who can foresee what the next step would be if the circle were to include the nonviable fetus. If life is not to become intolerable, there must be some boundaries to the zone of liability. Neither logic nor science is the determining factor. It is the policy of the law which must establish a reasonable limitation on liability. In our opinion, it is not reasonable to extend liability to a nonviable fetus. [*Wallace v. Wallace,* 421 *A.*2d 134, 136-37 (N.H. 1980).]

While a few states may have reached a contrary conclusion as to the availability of the wrongful death cause of action for a non-viable fetus, this does not render the New Jersey statute violative of equal protection guarantees.

In sum, Petitioner's arguments are contrary to the decisions in sister jurisdictions, the fundamental principles of the Act, and the basic reasoning of *Giardina*, *Acuna I*, *Alexander*, and *Marie*. Against this, Petitioner has provided no compelling basis for this Court to accept the Petition for review.

CONCLUSION

It is submitted that in accordance with Rule 10, the Petition be denied for the reasons expressed above, in addition to those articulated by the Appellate Division in *Acuna I* and by the Third Circuit in *Alexander* and *Marie*.

Respectfully submitted,

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APPENDIX

APPENDIX A ON BEHALF OF RESPONDENTS:
STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
1	AL	Yes.	Viability.	*Eich v. Gulf Shores*, 300 *So.* 2d 354, 358 (Ala. 1974) (allowing wrongful death action for viable fetus); *Gentry v. Gilmore*, 613 *So.* 2d 1241, 1243-44 (Ala. 1993) (no cause of action for non-viable fetus).	No reported decision.
2	AK	No.	Live birth.	*Mavel v. Pinkerton's Inc.*, 399 F. Supp. 2d 1064, 1068 (D. Alaska 2005) (no cause of action for pre-viability wrongful death).	No reported decision.
3	AZ	Yes.	Viability.	*Summerfield v. Superior Court of County of Maricopa*, 698 *P.*2d 712, 722 (Ariz. 1985) (recognizing cause of action post-viability wrongful death); *Jeter v. Mayo Clinic Arizona*, 121 *P.*3d 1256 (Ariz. App. 2005)(no wrongful death cause of action for three-day old non-viable embryo).	No reported decision.
4	AR	Yes.	Live birth.	*Norwood v. Baker*, 172 F.3d 595, 598 (8th Cir. 1999) (Arkansas wrongful death statute "does not allow a cause of action to be brought for a stillborn fetus").	No reported decision.
5	CA	No.	Live birth.	*Justus v. Atchinson*, 565 *P.*2d 122, 131 (Cal. 1977) (live birth required to state cause of action for wrongful death), *overruled on other grounds*, *Ochoa v. Superior Court*, 703 *P.*2d 1 (Cal. 1985).	*Justus*, 565 *P.*2d at 131.
6	CO	Yes.	Viability.	*Hamby v. McDaniel*, 984 P.2d 606, 608 (Colo. 1999) (wrongful death statute "may be maintained only for the death of a viable fetus").	No reported decision.
7	CT	Yes.	Viability.	*Hatala v. Markiewicz*, 224 *A.*2d 406, 408 (Conn. Super. 1966) (allows wrongful death cause of action for viable fetus).	No reported decision.
8	DE	Yes.	Viability.	*Watson v. Lidgett*, 63 A.3d 1033, 1038 (Del. Super. Ct. 2012) (wrongful death statute "limited to the death of a viable fetus").	Failed to establish.
9	FL	No.	Live birth.	*Hernandez v. Garwood*, 390 *So.* 2d 357, 359 (Fla. 1980) (no cause of action for stillborn fetus).	*Ibid.*
10	GA	Yes.	Quickening.	*Porter v. Shanbaum*, 516 S.E.2d 324, 325 (Ga. App. 1999) (recovery of wrongful death "for the negligent injury to a viable fetus").	No reported decision.
11	HI	Yes.	Viability.	*Wade v. U.S.*, 745 *F. Supp.* 1573, 1579 (D. Hawaii 1990) (with no controlling authority on point, federal court's "best estimate" is that Hawaii law would permit wrongful death claim for viable fetus but not for non-viable fetus).	No reported decision.

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APPENDIX A ON BEHALF OF RESPONDENTS:
STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
12	ID	Yes.	Viability.	*Volk v. Baldazo*, 651 *P.*2d 11, 14 (Idaho 1982) (cause of action may be maintained for viable fetus); *Santana v. Zilog, Inc.*, 95 *F.*3d 780, 782 (9th Cir. 1996) (anticipating that Idaho law would not recognize wrongful death action for non-viable fetus).	No reported decision.
13	IL	Yes.	Fertilization.	740 *Ill. Comp. Stat.* 180/2.2 (2007).	No reported decision.
14	IN	No.	Live birth.	*Bolin v. Wingert*, 764 *N.E.*2d 201, 207 (Ind. 2002) ("only children born alive are 'persons' for purposes of wrongful death statute").	*McKey v. Sargent*, 855 *N.E.*2d 324, 328-29 (Ind. Ct. App. 2006), *transfer denied*, 869 *N.E.*2d 447 (Ind. 2007).
15	IA	No.	Live birth.	*Dunn v. Rose Way, Inc.*, 333 *N.W.*2d 830, 843-35 (Iowa 1983) (wrongful death suit cannot be brought for the death of a viable unborn child).	No reported decision.
16	KS	Yes.	Viability.	*Hale v. Manion*, 368 *P.*2d 1, 3 (Kan. 1962) (parents can maintain a wrongful death action for a stillborn viable fetus); *Hume v. Clinton*, 792 *P.*2d 1032, 1038 (Kan. 1990) (no wrongful death cause of action for non-viable fetus).	No reported decision.
17	KY	Yes.	Viability.	*Rice v. Rizk*, 453 *S.W.*2d 732, 735 (Ky. 1970) (viable fetus a "person" within meaning of wrongful death act).	No reported decision.
18	LA	Yes.	Fertilization.	*La. Civ. Code Ann. art.* 26 (2006) (unborn child considered a "person" under wrongful death act, codifying *Danos v. St. Pierre*, 402 *So.*2d 633, 637 (La. 1981)).	No reported decision.
19	ME	No.	Live birth.	*Shaw v. Jendzejec*, 717 *A.2d* 367, 372 (Me. 1998) (state wrongful death act does not recognize a cause of action for wrongful death brought by the parents of a stillborn fetus).	No reported decision.
20	MD	Yes.	Viability.	*Smith v. Bocelle*, 804 *A.*2d 451, 456-57 (Md. 2002) (wrongful death action not maintainable for non-viable fetus).	*Kandel v. White*, 663 *A.*2d 1264, 1269 (Md. 1995).
21	MA	Yes.	Viability.	*Mone v. Greyhound Lines, Inc.*, 331 *N.E.*2d 916, 918-20 (1975); *Remy v. MacDonald*, 801 *N.E.*2d 260, 265 (Mass. 2004) (wrongful death action allowed for viable fetus); *Thibert v. Mika*, 646 *N.E.*2d 1025, 1026 (Mass. 1995) (no cause of action for non-viable fetus).	No reported decision.

APPENDIX A ON BEHALF OF RESPONDENTS: STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
22	MI	Yes.	Viability.	*Estate of McDowell v. Stubbs*, 564 *N.W.*2d 463 (Mich. 1997) (wrongful death action allowed for viable fetus); *McClain v. University of Michigan Bd. of Regents*, 665 *N.W.*2d 484, 486 (Mich. App.), *appeal denied*, 671 *N.W.*2d 46 (Mich. 2003) (a non-viable fetus is not a person with the wrongful death act)	No reported decision.
23	MN	Yes.	Viability.	*Verkennes v. Corniea* (1949) 38 *N.W.*2d 838, 841 (Minn. 1949) (cause of action allowed for wrongful death of a viable fetus).	No reported decision.
24	MS	Yes.	Quickening.	*Miss. Code Ann.* § 11-7-13 (2007) (codifying *Gregory v. Fed. Credit Union v. Tucker*, 853 *So.*2d 104 (Miss. 2003)) (wrongful death statute created cause of action for death of fetus which is "quick")	No reported decision.
25	MO	Yes.	Fertilization.	*Connor v. Monfem Co.*, 898 *S.W.*2d 89, 92-93 (Mo. 1995) (plaintiff could bring a claim for the wrongful death of non-viable fetus).	No reported decision.
26	MT	Yes.	Viability.	*Sudeck v. Kyler*, 887 *P.*2d 730, 733 (Mont. 1995) (allowing cause of action for full-term stillborn fetus); *Blackburn v. Blue Mountain Women's Clinic*, 951 *P.*2d 1, 16 (Mont. 1997) (limiting action to fetuses which are viable)	No reported decision.
27	NE	No.	Live birth.	*Smith v. Columbus Community Hospital, Inc.*, 387 *N.W.*2d 490, 492 (Neb. 1986) (holding that viable fetus which dies prior to birth as result of another's negligence does not have cause of action for damages under wrongful death statute).	No reported decision.
28	NV	Yes.	Viability.	*White v. Yup*, 458 *P.*2d 617, 623-24 (Nev. 1969) (cause of action exists for stillborn viable fetus).	No reported decision.
29	NH	Yes.	Viability.	*Poliquin v. McDonald*, 135 *A.*2d 249, 251 (N.H. 1957) (cause of action exists for wrongful death of stillborn viable fetus); *Wallace v. Wallace*, 421 *A.*2d 134, 136-37 (N.H. 1980) (no cause of action for stillborn, non-viable fetus).	No reported decision.
30	NJ	No.	Live birth.	*Giardina v. Bennett*, 545 *A.*2d 139, 147 (N.J. 1988) (fetus not a person for purposes of wrongful death statute)	*Marie v. McGreevey*, 314 F.3d 136, 141-42 (3d Cir. 2002), *cert. denied*, 539 *U.S.* 910 (2003)
31	NM	Yes.	Viability.	*Salazar v. St. Vincent Hosp.*, 619 *P.*2d 826, 830 (N.M. Ct. App.) (recognizing an independent cause of action for the wrongful death of a viable fetus), *writ. quashed*, 617 *P.*2d 1321 (N.M. 1980); *Miller v. Kirk*, 905 *P.*2d 194, 195-96 (N.M. 1995) (no cause of action for non-viable fetus).	No reported decision.

APPENDIX A ON BEHALF OF RESPONDENTS:
STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death?	Point for Accrual	Authority	Failed Equal Protection Challenge
32	NY	No	Live birth	*Endresz v. Friedberg*, 248 *N.E.*2d 901, 905 (N.Y. 1969) (requiring live birth to bring wrongful death action)	No reported decision.
33	NC	Yes.	Viability.	*DiDonato v. Wortman*, 358 *S.E.*2d 489, 493 (N.C. 1987) (holding wrongful death statute's definition of "person" includes viable fetus).	No reported decision.
34	ND	Yes	Viability	*Hopkins v. McRae*, 359 *N.W.*2d 862, 863 (N.D. 1984) (wrongful death action may be brought for loss of a viable fetus)	No reported decision.
35	OH	Yes.	Viability.	*Werling v. Sandy*, 476 *N.E.*2d 1053, 1055 (Ohio 1985) (holding that a viable fetus negligently injured and subsequently stillborn could be the subject of a wrongful death action); *Egan v. Smith*, 622 *N.E.*2d 1191, 1193-94 (Ohio App. 1993) (no cause of action for non-viable fetus).	No reported decision.
36	OK	Yes	Viability	*Evans v. Olsen*, 550 *P.*2d 924, 928 (Okl. 1976) (allowing wrongful death of action for viable fetus); *Guye v. Hutcoholth*, 830 *P.*2d 1393, 1394 (Okl. App. 1991) (no wrongful death action for non-viable fetus)	No reported decision.
37	OR	Yes.	Viability.	*Libbee v. Permanente Clinic*, 518 *P.*2d 636, 640 (Or. 1974) (wrongful death action is available for death of viable fetus); *LaDu v. Oregon Clinic, P.C.*, 998 *P.*2d 773, 735-36 (Or. App.), *review denied*, 18 *P.*3d 1099 (Or. 2000) (no cause of action for wrongful death of non-viable fetus).	No reported decision.
38	PA	Yes	Viability	*Cowell ex rel. Bubna v. Palmer*, 634 *A.*2d 608, 610 (Pa. 1993) (wrongful death cause of action allowed only in cases of fetal viability)	No reported decision.
39	RI	Yes.	Viability.	*Miccolis v. AMICA Mut. Ins. Co.*, 587 *A.*2d 67, 69 (R.I. 1991) (holding non-viable fetus is not a "person" within the meaning of the wrongful death statute).	No reported decision.
40	SC	Yes	Viability	*Crosby v. Glass City Trucking Co.*, 532 *S.E.*2d 856, 857 (S.C. 2000) (nonviable fetus may not maintain wrongful death action)	No reported decision.
41	SD	Yes.	Fertilization.	*Wiersma v. Maple Leaf Farms*, 543 *N.W.*2d 787, 792 (S.D. 1996) (allowing wrongful death claim to be brought for non-viable fetus).	No reported decision.
42	TX	Yes	Viability	*Tex. Code Ann.* § 20-5.06(c) (2007) (permitting the recovery of damages for the wrongful death of a viable fetus)	No reported decision.
43	TX	Yes	Fertilization.	*Tex. Civ. Prac. & Rem. Code Ann.* § 71.001 (Vernon 2007) (defining embryo, at any stage post-fertilization, as an "individual" for purposes of wrongful death act).	*Fort Worth Osteopathic Hosp. v. Reese*, 148 *S.W.*3d 94, 98 (Tx. 2004).

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		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
44	UT	Yes.	Live birth.	*Nelson v. Peterson*, 542 *P.*2d 1075, 1077 (Utah 1979) (allowing emotional distress recovery but not wrongful death claim for death of a viable fetus).	No reported decision.
45	VT	Yes.	Viability.	*Vaillancourt v. Medical Center Hospital* of Vermont, 425 *A.*2d 92, 95 (Vt. 1980) (upholding statutory cause of action for wrongful death of viable, stillborn fetus).	No reported decision.
46	VA	No.	Live birth.	*Castle v. Peters*, 636 S.E.2d 342, 347-48 (Va. 2006) (fetus not a "person" for purpose of wrongful death act until born alive).	No reported decision.
47	WA	Yes.	Viability.	*Moen v. Hanson*, 537 *P.*2d 266, 266-67 (Wash. 1975)(wrongful death action permitted for viable fetus); *Baum v. Burrington*, 79 *P.*3d 456, 459 (Wash. Ct. App. 2003) (no cause of action for non-viable fetus), *appeal denied*, 95 *P.*3d 758 (Wash. 2004).	No reported decision. *But see Kim v. Long*, 2004 *WL* 1775664 *2 (Wash. App. 2004) (argument raised, but constitutional issues not reached).
48	WV	Yes.	Fertilization.	*Farley v. Sartin*, 466 S.E.2d 522, 534 (W. Va. 1995) (wrongful death statute encompasses non-viable fetus).	No reported decision.
49	WI	Yes.	Viability.	*Kwaterski v. State Farm Mut Automobile Ins. Co.*, 148 *N.W.*2d 107, 111-12 (Wis. 1967) (wrongful death action permitted in death of viable fetus).	No reported decision.
50	WY			*Wyo. Stat. Ann.* § 1-38-101 (2007) (providing that "[w]henever the death of a person is caused by wrongful act, neglect or default . . . such as would have entitled the party injured . . . to maintain an action to recover damages if death had not ensued . . ."). No reported decision interpreting applicability of statute to fetus or embryo.	No reported decision.
51	DC	Yes.	Viability.	*Greater Southeast Community Hosp. v. Williams*, 482 *A.*2d 394, 397-98 (D.C. 1984) (cause of action for wrongful death of viable fetus); *cf. Ferguson v. District of Columbia*, 629 *A.*2d 15, 20 (D.C. 1993) (non-viable fetus does not have cause of action under survival statute).	No reported decision.

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STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

***Wrongful Death Claim on Behalf of a Fetus Permitted*:** **39 Jurisdictions.**

Viability: 31 AL, AZ, AR, CO, CT, DE, HI, ID, KS, KY, MD, MA, MI, MN, MT, NV, NH, NM, NC, ND, OH, OK, OR, PA, RI, SC, TN, UT, VT, WI, DC.

Quickening: 2 GA (statute), MS (statute).

Fertilization: 6 IL (statute), LA (statute), SD, MO, TX (statute), WV.

***Wrongful Death Claim on Behalf of Non-Viable Fetus Not Permitted*:** **21 Jurisdictions.**

AL, AK, AZ, HI, ID, KS, MD, MA, MI, MT, NH, NM, OH, OK, OR, PA, RI, SC, UT, WA, DC.

***Wrongful Death Claim on Behalf of a Fetus Not Permitted*:** **11 Jurisdictions.**

AK*, CA, FL, IN, IA, ME, NE, NJ, NY, VA, WA.

***Jurisdictions With No Controlling State Law*:** **1 Jurisdiction (WY)**

***Failed Equal Protection Challenges*:** **6 Jurisdictions**

California: *Justus v. Atchinson*, 565 *P.*2d 122, 131 (Cal. 1977), *overruled on other grounds*, *Ochoa v. Superior Court*, 703 *P.*2d 1 (Cal. 1985).

Florida: *Hernandez v. Garwood*, 390 *So.* 2d 357, 359 (Fla. 1980).

Indiana: *McVey v. Sargent*, 855 *N.E.*2d 324, 328-29 (Ind. Ct. App. 2006), *transfer denied*, 869 *N.E.*2d 447 (Ind. 2007).

Maryland: *Kandel v. White*, 663 *A.*2d 1264, 1269 (Md. 1995).

New Jersey: *Marie v. McGreevey*, 314 *F.*3d 136, 141-42 (3d Cir. 2002), *cert. denied*, 539 *U.S.* 910 (2003).

Texas: *Fort Worth Osteopathic Hosp. v. Reese*, 148 *S.W.*3d 94, 98 (Tx. 2004), abrogated by *Tex. Civ. Prac. & Rem. Code Ann.* § 71.001 (Vernon 2007).

***Successful Equal Protection Challenges*:**
None.

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* Alaska federal courts have held no wrongful death cause of action lies for a non-viable fetus, but state courts have not considered this issue, or whether such a claim is allowed for a viable fetus.